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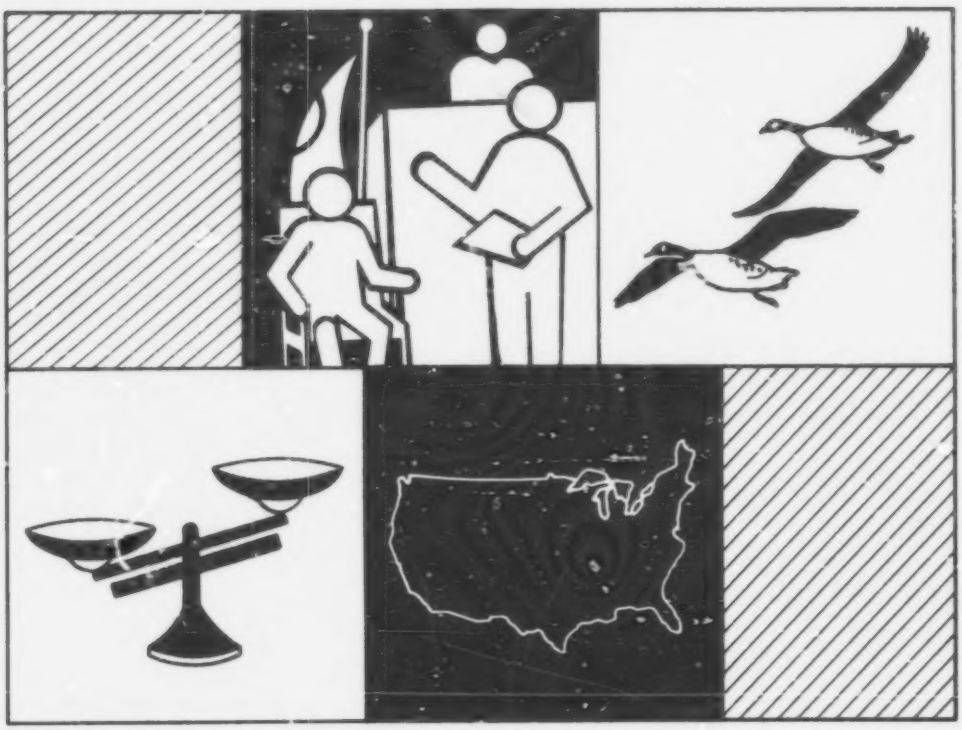

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ENVIRONMENTAL CONTAMINANTS: SELECTED LEGAL TOPICS

by

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DISCLAIMER

This report briefly describes Federal laws that may be used to address the effects of hazardous and toxic wastes on fish and wildlife resources. It is not a comprehensive description of all environmental legislation, nor a legal brief for any legal case. Information included here does not reflect the views or policies of the U.S. Fish and Wildlife Service, U.S. Department of the Interior.

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PREFACE

The National Ecology Center and the Colorado Cooperative Wildlife Research Unit cooperated in producing this description of selected Federal laws and court cases relating to environmental contaminants. The purpose of this report is to summarize some Federal laws and cases regarding hazardous and toxic waste problems as they relate to environmental protection.

The laws and cases reported here were selected by the authors. They do not represent an exhaustive list of all Federal laws and cases related to the subject, and are not intended to be legal analyses or legal interpretations by the authors.

Stewart W. Olive was a research associate with the Colorado Cooperative Wildlife Research Unit when the report was written. He contributed most to the technical research and descriptions contained in the document. Mr. Olive has since completed requirements for a J.D. degree at the University of Colorado.

Richard L. Johnson is an economist with the National Ecology Center. He contributed most to the determination of user needs and the selection of legal topics. Mr. Johnson is currently completing a dissertation for the Ph.D. degree in Agricultural and Natural Resource Economics at Michigan State University.

Both authors maintain a continuing interest in providing understandable descriptions of legal and economic issues for use in environmental protection and management. Please address any comments or suggestions to the authors at the following address:

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INTRODUCTION

The problem of hazardous and toxic wastes is one of growing concern. While the environmental laws of the 1960's and 1970's have impacted the general pollution problem, these early laws were debated and enacted without considering disposal problems once waste materials were no longer deposited in the air and water(1). Today, public concern is at a very high level. For example, the Love Canal incident in Niagara Falls, New York, brought a great deal of attention to the problem of what to do with waste materials. These concerns were reinforced by such incidents as the release of kepone into the James River in Virginia, the spreading of dioxin on roads in the Times Beach, Missouri, area, and the contamination of groundwater in the metropolitan Minneapolis, Minnesota, area by creosote wastes. The increasing production of hazardous wastes over the years has further complicated the waste disposal problem(2).

Congress has enacted several pieces of legislation intended to address the problem of hazardous and toxic waste disposal, including the Toxic Substances Control Act and the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund). These new laws, plus various portions of already existing laws, form the current Federal legislatively-mandated framework for dealing with the hazardous and toxic waste disposal problem. Once laws are on the books, it is almost inevitable that legal actions will be initiated to obtain judicial interpretations of their intent and scope.

This paper has two purposes. The first is to provide readers with a synopsis of the Federal laws that have been, or might be, utilized to address the hazardous and toxic waste problem, particularly as they relate to environmental protection. The second is to provide readers with information on how the Federal courts have interpreted sections and provisions of these laws. The selection of both the laws and the court cases was done by the writers. Research was limited to Federal laws and Federal court interpretations, with a few exceptions to provide information that has Nationwide applicability.

The report contains a synopsis of 13 Federal laws and court interpretations for all but one. The laws included are the National Environmental Policy Act (NEPA); the Clean Water Act; the Marine Protection, Research, and Sanctuaries Act; the Resource Conservation and Recovery Act; the Toxic Substances Control Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Migratory Bird Treaty Act; the Federal Insecticide, Fungicide, and Rodenticide Act; the Fish and Wildlife Coordination Act; the Endangered Species Act; the Surface Mining Control and Reclamation Act; the Ports and Waterways Safety Act; and the Used Oil Recycling Act. Some laws,

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such as the Clean Air Act and the Safe Drinking Water Act, were omitted because their language addresses the effect of hazardous substances on human health and does not mention environmental protection. The court cases listed under the laws were selected based on their applicability to the purpose of this paper. There are a number of issues in most of the laws that remain to be interpreted; these issues cannot be resolved until appropriate cases are brought before the courts. Thus, the coverage of court cases in this paper varies from law to law. Some laws, NEPA for example, have been extensively litigated. Others, such as the Used Oil Recycling Act, have had few or no pertinent court decisions.

This paper reports the current state of the laws and selected court interpretations. It does not provide an extensive legal analysis of the possibilities of the laws or recommendations about their use. Government employees should be familiar with their agency's official policies prior to initiating any activities related to these laws.

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NATIONAL ENVIRONMENTAL POLICY ACT
42 U.S.L. 4321 et seq.

LAW

The National Environmental Policy Act (NEPA) is the best known, most written about, most comprehensive, and most litigated of all the Federal environmental statues(1). The Congressional declaration of the purpose of NEPA includes "... to declare a National policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; ..."(2).

In Subchapter I - Policies and Goals, Congress declared that it is the continuing policy of the Federal Government, in cooperation with State and local governments and concerned public and private organizations, to use all practical means and measures to create and maintain conditions under which man and nature can exist in productive harmony. In order to implement this policy, Congress stated that it is the continuing responsibility of the Federal Government, consistent with other essential National policy considerations, to improve and coordinate Federal plans, functions, programs, and resources. Congress set forth six policy goals(3):

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of benefical uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our National heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

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The real legislative strength of NEPA is its requirement that all Federal agencies(4) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

(1) the environmental impact of the proposed action;

(2) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(3) alternatives to the proposed action;

(4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

NEPA requires that the Federal agency responsible for developing the detailed statement, commonly called an Environmental Impact Statement (EIS), consult with and obtain the comments of any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved(5).

The act also required all agencies of the Federal Government to review their statutory authorities, regulations, and policies and procedures to determine if they were inconsistent with the purposes of NEPA.

NEPA established the Council on Environmental Quality (CEQ), which is empowered to review the various programs and activites of the Federal Government to determine the extent to which they contribute to the implementation of the policies of NEPA. CEQ also is to develop and recommend, to the President, National policies to improve environmental quality(6).

COURT INTERPRETATIONS

The courts have made a number of important rulings relative to the Congressional policy statement contained in NEPA. For example, the courts have ruled that the requirements of the statute are subject to a construction of reasonableness(7). The courts also have ruled that NEPA requires that a careful and informed decisionmaking process be established and that NEPA's procedural requirements be strictly complied with(8). The intent of the policy statement has been interpreted to require agencies to consider and give effect to the environmental goals of the statement. A reviewing court is required to conduct a substantial inquiry to determine whether or not an agency has acted within its authority and was not arbitrary or capricious in its choice of actions. The court is not allowed to substitute its judgement for that of the agency(9). The courts have ruled that projects started prior to the enactment of NEPA, but incomplete at time of passage, can be subject to NEPA's requirements; however, this retroactive application may be limited(10).

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There have been rulings that hold that the requirements of NEPA do not apply to the States unless there is also Federal involvement or responsibilities(11). The courts have ruled that violation of NEPA does not necessarily require injunctive relief(12). In other words, a court order requiring someone to refrain from doing, or to do, certain acts is not required as a remedy for a violation of NEPA.

NEPA must be complied with to the fullest extent possible unless there is a clear and unavoidable conflict in statutory authority(13). For example, NEPA can apply to activities concerned with National security, but in an abridged way. The more sensitive the National security matter, the less likely that NEPA applies(14).

NEPA requires that any evaluation of a project's environmental consequences take place at an early stage in the project's planning process(15). NEPA also imposes an affirmative obligation on agencies to seek out information on proposed Federal actions(16). While NEPA does not require agencies to adopt any particular internal decisionmaking structure, it does require agencies to inform the public that environmental concerns have been considered(17). The courts have stated that Congress never intended that agencies elevate environmental concerns over other appropriate considerations, but that agencies are to take a hard look at the environmental consequences before taking a major action(18).

NEPA has been construed to apply to the protection of the quality of life for urban residents(19). The courts have ruled that grudging, pro forma compliance is insufficient, but that absolute perfection is not required(20). NEPA was not intended to be used as a vehicle for continual delay, but its mandatory requirements may not be undermined because compliance might cause administrative costs, delays, and other problems(21). This includes possible detriment to persons doing business with the Federal Government.

The area of NEPA that has been given the most attention by the courts is the requirement that an Environmental Impact Statement (EIS) be prepared for major Federal actions. Courts generally have ruled that the requirement to prepare an EIS is mandatory and will be strictly enforced. The agency must, in its EIS, show proper study, description, development, and consideration of appropriate alternatives, although only feasible, reasonable alternatives to the proposed action need to be considered(22). The EIS must contain research results, and these results must be adequately documented(23). Lack of information on the part of an agency to sufficiently determine environmental impacts cannot be used as an excuse not to prepare an EIS(24). The exceptions to the need for an EIS are where National security would be impaired by its preparation, as discussed earlier, and in temporary or emergency situations where immediate and prompt actions are required. Several proposed actions that will have a cumulative or synergistic environmental impact on a region must be considered together in a comprehensive impact statement(25).

There are several purposes for an EIS. One purpose is for coordination among Federal agencies in terms of their environmental policies to ensure that optimally beneficial actions are taken. Another important purpose of the EIS is to provide the courts with information that can be used to determine whether

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or not the agency made a good faith effort to take into account the values that NEPA seeks to protect(26). The EIS also provides the public with relevant information about the project-related environmental costs(27). Furthermore, the EIS was intended to provide sufficient information on environmental consequences so that Congress and other decisionmakers could conduct a critical evaluation of the project(28).

All agencies of the Federal Government generally have to file EIS's for their major activities. An exception to this rule is that the U.S. Environmental Protection Agency (EPA) does not have to file an EIS in connection with its responsibilities under Federal environmental statutes(29). The EPA is legislatively exempt from filing an EIS under the Clean Air and the Clean Water Acts, except for the issuance of discharge permits for new sources and grants for publicly owned waste water treatment works. The requirement that an EIS be filed by Federal agencies for major actions has been interpreted to include not only direct actions by the agency itself, but also those situations where the agency makes a decision that permits activities by others(30).

Courts have ruled that the need to prepare an EIS for what is basically a single project cannot be frustrated by segmenting the proposed action into minor parts(31). This rule on segmentation may not apply when the scope of the project is quite large. In deciding when a proposed action does not require an EIS, agencies are generally required to develop a reviewable environmental record that contains an environmental analysis(32). This assessment must provide a convincing rationale for not filing an EIS but does not need to contain the detail that an EIS requires. Public notice and public input are not required prior to a determination that an EIS is, or is not, necessary, unless the agency requires otherwise in its own rules(33). Agency determinations are governed by the rule of reason.

NEPA requires the lead agency to consult with other agencies that either have jurisdiction by law or that have special expertise with respect to the environmental impacts of proposed projects(34). The basic burden is on the sponsoring agency to seek out and contact appropriate agencies. The focus of input from other agencies should be on the environmental impacts of the proposed activity(35). These comments should receive due consideration(36).

It has been held that when an agency decides not to issue an EIS and is sued on that decision, it is up to the party bringing the suit to make a prima facie showing that the agency did not adhere to the requirements of NEPA. The burden of proof shifts to the Federal agency to support its environmental assessment by a preponderance of the evidence(37). In a court action contesting the adequacy of an EIS, the courts have ruled that the party bearing the burden of proof must sustain the action by preponderance of the evidence(38).

Private citizens generally have the right to enforce the requirements of NEPA, provided they meet certain criteria. First, the party has to show that they have suffered an injury-in-fact from the action of a Federal agency. Second, the party must be within the zone of protection of NEPA under which the agency action was taken. Actions may be brought by organizations that have individuals qualified to sue as members(39).

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The court's scope of review under NEPA generally is interpreted as a narrow one; review usually is limited to determining if procedural requirements have been complied with(40). Courts generally limit their reviews to whether or not, based on information contained in the EIS, the agency's decision was arbitrary, capricious, an abuse of discretion, or not in accordance with the law. Courts will not reject an agency's decision if it was reached procedurally in full, good faith, with individualized consideration and balancing of environmental factors(41).

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(26) 39A C.J.S. Health & Environment, Sect. 68

(27) Citizens Against Toxic Sprays v. Bergland, 428 F. Supp. 908 (D. Or 1977)

(28) 39A C.J.S. Health & Environment, Sect. 68

(29) 39A C.J.S. Health & Environment, Sect. 69

(30) Conservation Council of N.C. v. Costango, 398 F. Supp. 653 (E.D. N.C. 1975), affd. 528 F.2nd 250

(31) 39A C.J.S. Health & Environment, Sect. 74

(32) 39A C.J.S. Health & Environment, Sect. 76

(33) 39A C.J.S. Health & Environment, Sect. 76

(34) State of Mo., ex rel. Ashcroft v. Department of Army, Corps of Engineers, 526 F. Supp. 660 (W.D. Mo. 1980), affd. 672 F.2d 1297

(35) Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex 1973)

(36) 39A C.J.S. Health & Environment. Sect. 80

(37) Simmons v. Grant, 370 F. Supp. 5 (S.D. Tex. 1974)

(38) 39A C.J.S. Health & Environment, Sect. 82

(39) 39A C.J.S. Health & Environment, Sect. 83

(40) 39A C.J.S. Health & Environment, Sect. 85

(41) 39A C.J.S. Health & Environment, Sect. 85

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CLEAN WATER ACT
33 U.S.C. 1251 et seq.

LAW

The Clean Water Act of 1977 (CWA) is an extremely complex and lengthy statute. It is a key statute regarding the control of toxic substances. Section 1251(a)(3) of the CWA states that it "... is the National policy that the discharge of toxic pollutants in toxic amounts be prohibited." The CWA includes a policy statement, in section 1251(a)(2), that "... it is the National goal that wherever attainable, an interim goal of water quality which provides for the protection of fish, shellfish, and wildlife and provides for recreation in or on the water be achieved by July 1, 1983." In order to meet these and other policy goals set forth in the act, Congress included a statement in section 1251(e), that stresses the importance of citizen participation in implementing the CWA. The CWA directs the EPA to provide for, encourage, and assist public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation plan, or program established by the EPA or by any State.

Section 1288 contains the areawide waste treatment management planning process. A section 1288 area is established by the Administrator of EPA identifying areas that, as a result of urban-industrial concentration or other factors, have substantial water quality control problems. The Governor of each State or, if he does not identify areas, local officials, may designate such areas. The heart of section 1288 is the development of areawide treatment management plans. These plans shall contain alternatives for waste treatment management and shall be applicable to all wastes generated within the planning area (Sect. 1288(b)(1)(A)). The plans are required to contain an assessment of needs for treatment works, and where appropriate, assessment of agriculture-related, nonpoint sources of pollution, mine-related sources of pollution, and saltwater intrusions into rivers, lakes, and estuaries.

Section 1288(e) states that no permit may be issued under section 1342 of the act [the National Pollution Discharge Elimination System (NPDES) permit system for point source discharges discussed later], if it would conflict with an approved plan.

Section 1288(j) allows the Secretary of Agriculture, with the concurrence of EPA, to establish and administer a program to enter into contracts for the purpose of installing and maintaining measures to control nonpoint sources of pollution to improve water quality in those areas that have an approved plan. The contracts are with landowners or operators.

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Section 1311(a) makes the discharge of any pollutant by any person an unlawful act unless that discharge is in compliance with sections 1312, 1316, 1317, 1325, 1342, or 1344 of the CWA. Section 1311(b)(1)(A) requires all point source discharges to apply the "... best practicable control technology currently available (BPT), as defined by section 1314(b). The exception to this rule is that publicly owned treatment works (POTW's) do not have to apply BPT. The section is limited to dischargers who discharge directly into a waterway. Dischargers who discharge into a POTW, however, must meet the applicable pretreatment and toxic control requirements of section 1317.

Section 1311 (b)(2)(A) requires that point source dischargers apply the "... best available technology [BAT] economically achievable for such category or class", when such technology will result in reasonable progress toward the goal of eliminating the discharge of all pollutants. This requirement is hinged on the EPA's finding that such an elimination of pollutants is technologically and economically achievable for the category or class. Dischargers who discharge into POTW's must meet the applicable pretreatment and toxic control requirements of section 1317. This compliance with section 1317 for toxic pollutants, referred to in Table 1 of Committee Print Numbered 5-30 of the Committee on Public Works and Transportation of the House of Representatives, must have taken place no later than July 1, 1984. Compliance must be achieved within 3 years of the establishment of effluent limitations for other toxic pollutants under section 1317 (a)(1). Compliance with the effluent standards for all other pollutants must be met by July 1, 1987, at the latest (Sect. 1311 (b)(2)(F)).

Section 1313 deals with the establishment of water quality standards and implementation plans. The review, revision, and adoption or promulgation of revised or new water quality standards, pursuant to section 1313(c), shall be completed by the date 3 years after December 29, 1981. Section 1313(c) states that the water quality standards shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.

Section 1314(b) requires the EPA to publish effluent limitation guidelines defining the BPT and BAT for classes and catagories of point sources. Section 1314(e) allows the EPA to, after consultation with appropriate Federal and State agencies and other interested persons, publish regulations establishing effluent controls supplementary to the BPT and BAT requirements for "... any specific pollutant for which the Administrator is charged with a duty to regulate as a toxic or hazardous pollutant under section 1317(a)(1) or section 1321. The purpose is to control sludge or waste disposal that the EPA determines "... may contribute significant amounts of such pollutants to navigable waters." The EPA, under section 1314(g)(1), is to publish guidelines for the pretreatment of pollutants that are not susceptible to treatment by POTW's.

Section 1317(a)(1) established a toxic substance list that the EPA can update periodically. The factors that the EPA considers when determining if a pollutant should be added or deleted from the list include the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms, and the nature and extent of the effect of the toxic

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pollutant on such organisms. The EPA is required by section 1317(b)(2) to promulgate effluent limitations based on the BAT for the listed toxic pollutants by applicable category or class of point sources. The effluent standards adopted by the EPA must provide an ample margin of safety and be related to the category or categories to which the effluent standard shall apply (307(a)(4)(5)).

Section 1317(c) requires the EPA to issue pretreatment standards for new source discharges that discharge into POTW's. These standards prevent the discharge of any pollutant into POTW's where the pollutant may interfere with, pass through, or otherwise be incompatible with the POTW's. Section 1317(d) makes it unlawful for any owner or operator of a source to operate that source in violation of established effluent standards, prohibitions, or pretreatment standards.

Section 1319 is the enforcement section of the CWA. It covers the conditions and limitations implementing sections 1311, 1312, 1316, 1317, 1318, 1328, 1342, 1344, and 1345 of the act. The EPA can: (1) issue compliance orders to dischargers giving them a specified period of time to correct violations; (2) initiate civil actions to either enforce compliance orders or to enjoin violations and secure other appropriate relief; and (3) initiate criminal actions against persons who willfully or negligently violate these sections of the CWA.

Section 1321(b)(2)(A) requires the EPA to develop, promulgate, and revise, as appropriate, regulations designating elements and compounds, other than oil, as hazardous substances if, when discharged in any quantity into the navigable water, they present an imminent and substantial danger to public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches. The EPA can act to mitigate damage to public health and welfare from a discharge and to add the cost of the mitigation to the removal costs assessed against the dischargers [Sect. 1321(b)(6)(c)].

Section 1321(b)(3) prohibits the discharge of oil or hazardous substances into United States' waters or onto shorelines in harmful quantities, as determined by the President. Exceptions are discharges permitted under the International Convention for the Prevention of the Pollution of the Sea by Oil, 1954, as amended, and dischargers permitted in quantities, or at times and locations, or under such circumstances or conditions, that the President, by regulation, determines not to be harmful. The President can, under section 1321(c)(1), act to remove or arrange for the removal of oil or other discharged substances, or where there is a substantial threat of a discharge, into navigable waters.

Federal facilities are required to comply with all Federal, State, interstate, and local requirements for the control of water pollution in the same manner as any nongovernmental entity. The President can authorize 1-year exemptions for Federal effluent sources if it is in the paramount interest of the United States (Sect. 1323). An exception to the exemption is that the requirements of section 1317 are not waivable.

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Section 1342 significantly impacts efforts to combat water pollution. This section established the National Pollutant Discharge Elimination System (NPDES) permits. Section 1342(a)(1) authorized the EPA to issue a NPDES permit for the discharge of any pollutant, conditioned by the requirement that the discharge meet all applicable requirements of sections 1311, 1312, 1316, 1317, 1318, and 1343 of the CWA.

The EPA is required, under section 1342(a)(5), to delegate permit-issuing authority to the States for navigable waters within their jurisdictions, once the EPA determines that the State has the capacity to carry out the permitting program in a manner that will fulfill the purposes of the CWA. No permit can be issued by a State, however, if the EPA objects to its issuance (Sect. 1342(a)(5)). One of the conditions necessary for the EPA to approve a State permit program is adequate authority to ensure that any permit for a discharge from a POTW requires identification of the character and amount of pollutants from any significant source, subject to the requirements of section 1317(b). States also must have a program that ensures compliance with pretreatment standards by each source.

Section 1342(c)(2) requires State NPDES programs to be in compliance with section 1342 at all times, with the EPA required to withdraw approval from a State program, under section 1342(c)(3), when EPA determines that the program is not being administered in accordance with section 1342.

Section 1342(k) states that compliance with the conditions of an NPDES permit is automatic compliance with sections 1311, 1312, 1316, 1317, and 1343, except for standards imposed under section 1317 for a toxic pollutant injurious to human health.

Section 1344 governs the discharge of dredge and fill materials into the navigable water of the United States. Section 1344(a) states that the Secretary of the Army may, after notice and opportunity for public hearings, issue permits for the discharge of dredge and fill material, at specified sites, into the navigable waters. Section 1344(c) authorizes the Administrator of EPA to prohibit any defined area as a disposal site when he determines, after notice and opportunity for hearings, that the discharge of such materials will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishing areas (including spawning and breeding areas), wildlife, or recreation areas. Before the Administrator makes such a determination, he shall consult with the Secretary.

Section 1344(e) allows the Secretary to issue general permits on a State, regional, or Nationwide basis for any category of activities if the Secretary determines that the activities are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal, cumulative adverse effect on the environment. The permits issued under this section shall not be issued for a period of more than 5 years. The permit may be revoked or modified if the Secretary, after opportunity for a public hearing, determines that the activities authorized by such a general permit have an adverse impact on the environment or that such activities are more appropriately authorized by individual permits.

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The major exceptions to the permit program are contained in 1344(f). The activities that are not prohibited are the discharge of dredge or fill material:

(1) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(2) for the purpose of maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structure;

(3) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(4) for the purpose of construction of temporary sedimentation basins on a construction site, which does not include placement of fill material into the navigable waters;

(5) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed or maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized; and,

(6) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section.

This section does require a permit when any discharge of dredge or fill material incident to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, or where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced.

Section 1344(m) allows the Secretary of the Interior, acting through the Director of the Fish and Wildlife Service to comment on applications for permits under section 1344(a) or 1344(c). The comments must be issued not later than 90 days after the Secretary of the Army notifies the Secretary of the Interior of the application. The comments must be in writing.

Section 1344(s) lays out the procedures that are triggered when a permit is violated. Under 1344(s)(1) whenever the Secretary of the Army finds that any person is in violation of a condition in a permit, the Secretary of the Army can either issue an order requiring compliance or bring a civil action for relief. This relief can be in the form of a temporary or permanent injunction. Section 1344(s)(4) provides that any person who willfully or negligently

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violates any condition in a permit shall be punished by a fine of not less than $2,500 or more than $25,000 per day of violation, or by imprisonment of not more than one year, or both.

Section 1364 authorizes the EPA to bring suit to restrain the discharge of pollutants from any source if the discharge is presenting an imminent and substantual danger to the public health or livelihood.

Section 1365 authorizes any citizen to bring a civil suit against any violator of any effluent standard or duly issued compliance order. Citizens, under section 1365, can sue the EPA for failure to perform a nondiscretionary act or duty. There are limitations on citizen suits. First, a citizen, prior to bringing suit, must give 60 days advance notice of the alleged violation to the EPA, the appropriate State, and any alleged violator. The court may award litigation costs to any party if it deems the award appropriate.

The CWA contains a provision in section 1368(a) that forbids Federal agencies from entering into contracts with persons who have been convicted of offenses under section 1319, if the contract is to be performed at the facility where the violation took place and if the facility is owned, leased, or supervised by the convicted person.

COURT INTERPRETATIONS

The U.S. Supreme Court has interpreted the Congressional declaration of the goals and policy of the CWA, along with those of the Marine Protection, Research, and Sanctuaries Act (MPRSA), as displacing Federal common law of nuisance regarding interstate discharges of untreated sewage in two cases(1). The Court stated that Congress had replaced the common law concepts with the comprehensive regulation program of the act, supervised by an expert (EPA) administrative agency(2). The importance of these decisions appears to be that suits to abate water pollution for activities, covered by either the CWA or the MPRSA, must meet the criteria and procedures of the sections in each act governing filing of suits, or they are likely to be dismissed. The scope of the available legal remedies in this area seems to have been narrowed by these decisions to those remedies provided for in the CWA and MPRSA.

The courts have held that any interpretation of the act that operates to deny the EPA the power to set Nationally effective effluent standards would be a clear refusal to follow the intent of Congress and a "... gross misinterpretation" of the act itself(3). The courts have ruled that deference must be accorded to the EPA's interpretation of the act(4). One court stated that the act is to be given a reasonable interpretation that is not passed and dissected with the meticulous technicalities applied in testing other statutes and instruments(5).

In reviewing the CWA in relation to the MPRSA, one court ruled that the general demarcation line between the two acts is, with the exception of pipes or outfalls, the 3-mile limit of the territorial seas(6).

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The courts have stated that the intent of Congress in enacting the CWA was to establish an all encompassing program of regulatory water pollution and regulation(7). Thus, the intent of Congress is to improve and preserve the quality of the Nation's water, and all issues must be viewed in terms of this intent(8). The courts ruled that the act was intended to extend its jurisdiction to the Constitutional limit(9). Further, it was ruled that Congress, by enacting and amending the CWA, effectively implemented their intent to extend the broadest possible protection to the Nation's full hydrologic cycle; to provide for the protection and propagation of fish, shellfish, and wildlife; and to provide for recreation in and on the water, when it defined "navigable waters" as meaning waters of the United States, including territorial seas(10).

One court has held that the statement in section 1251, that it is the policy of Congress that State authority to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by the act, was not intended to take precedence over legitimate and necessary water quality considerations(11). The courts also held that there was a strong policy and intention to preserve States' rights to adopt standards more stringent than Federal standards(12).

Section 1311

The U.S. Supreme Court has held that the Federal courts cannot impose more stringent effluent limitations under Federal common law than the limitations imposed by the EPA(13). The courts have determined that the purpose of the act is to restore and maintain the natural chemical, physical, and biological integrity of the Nation's waters and to eliminate the discharge of pollutants into navigable waters by 1985(14).

The courts have provided a number of rulings in addressing the question of what constitutes a discharge into the waters of the United States. One ruling was that the actions of a defendant who discharges polluted waters through conveyances owned by another party were not removed from the scope of the act where the defendant knew or should have known that city sewers, into which the pollutants were discharged, led directly into a river. These actions were deemed sufficient to constitute a discharge into waters of the United States(15).

One court held that the scope of the control of the act must extend to all pollutants discharged into any waterway, including normally dry arroyos, where any water that might flow therein could end up in any body of water in which there is some public interest. The above determination extends to underground waters(16). Another court held, however, that the disposal of chemical wastes into underground waters that have not been alleged to flow into, or otherwise affect, surface water does not constitute a discharge of a pollutant under the act, nor does the CWA apply to subsurface wells(17).

One court held that the CWA does not only prohibit intentional discharges of pollutants, noting that the regulatory provisions of the act are written without regard to intentionality. The court went on to state that the CWA makes the person responsible for the discharge of any pollutant strictly liable(18). An explanation of the legal concept of strict liability is that a

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defendant may be held liable, in certain instances, even if they are not charged with a moral wrong-doing, and they have not even departed in any way from a reasonable standard of intent or care(19).

The courts have held that, while economic incapability is a justification for a variance from the best available technology (BAT) economically achievable standard for efficient limitations under section 1311, economic incapability is not a necessary condition for a variance with regard to the best practicable control technology currently available (BPT) standard for effluent limitations(20). However, the term "practical" in the BPT standards in the CWA has been interpreted to mean that Congress intended to limit the use of available technology only where additional technology necessary to achieve a mariginal level of effluent reduction is wholly out of proportion to the cost realized(21). One court ruled that the 1977 amendments to the act that prohibited the EPA from modifying any requirement that applies to specific pollutants on the toxic pollutant list does not apply to BPT variances(22).

When reviewing numerical standards for the discharge of pollutants into the Nation's waterways, court appeals must ask whether the EPA's numbers are within "... a zone of reasonableness," not whether or not the EPA's numbers are exactly right(23).

Section 1313

One court has held that the EPA has no power to disapprove State-adopted water quality standards for a specific creek area and required the EPA to include the State standards in the NPDES permit, even though they were more stringent than those required by the act(24). Courts have ruled that the EPA had no authority to consider a permit applicant's challenges of the validity of State water quality standards. Also, the EPA has been required to include more stringent State limitations in a permit, including those necessary to meet State water quality standards(25).

Section 1314

The courts have stated that the "effluent limitations" and "guidelines" of the act were intended to serve as controlling standards for State permit programs(26). The EPA's promulgation of effluent limitations on existing sources was a reasonable exercise of power, despite the contention that an effluent limitation on existing sources could be imposed only by permit issuers (i.e., the EPA or a conforming State)(27).

Guidelines issued by the EPA under this section were not aimed at guiding the discussion of permit issues, but were intended to describe the methodology that the EPA intended to use in establishing existing joint source effluent limitations for particular plants(28). Congress, in enacting this section, intended that the EPA was to set guidelines that were to be followed when permits were issued and that were to serve as the basis of the EPA's veto of objectional permits(29). Further, a court has stated that, although the standards provided are commonly known as "guidelines," absent variance standards, the prescriptions in the standards are mandatory and must be incorporated into NPDES permits to individual point source dischargers(30).

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Congress made two kinds of factors relevant to the EPA's determination of BPT standards: comparison factors (cost and benefit), for which Congress mandated a particular structure and weight of consideration (limited balancing), and consideration factors (e.g., age process, and nonwater quality environmental impacts), for which Congress left the structure and weight of consideration to the EPA to decide(31). Judicial review of the EPA's regulations promulgated pursuant to the act are to be limited to whether or not the EPA's decisions are "... arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law"(32).

Section 1317

Congressional enactment of the Toxic Substances Control Act (TSCA) did not repeal the EPA's authority to promulgate regulations under section 307, which prohibit the discharge of PCB's into the Nation's waterways(33). The purpose of this section was to aid, not impede, the EPA's health-based regulation of toxic substances. Congress intended that the EPA would use categorical determinations in setting standards for toxic pollutants, rather than limiting its consideration to species present in the receiving waters(34). The EPA, in promulgating regulations that limit discharges of toxic substances into the Nations's waterways, is not required by statute to consider economic and technological factors(35).

The courts have held that the choice of a suitable technique for estimating toxicity risks from the discharge of a pollutant can be "on the frontiers of science" and that such a decision between alternatives is a quintessential policy judgement within the EPA's discretion(36). As such, the EPA acted properly in applying a categorical approach, in setting effluent standards for toxaphene, and in not limiting its study to the aquatic life in receiving waters. The EPA properly tested six important marine species and, from the results of these tests, inferred the likely sensitivity of other species(37). Even though the EPA did not make an affirmative finding of carcinogenicity of toxaphene in its promulgation of regulations limiting discharge, EPA's concern with carcinogenicity was relevant to the setting of a standard providing an "ample margin of safety"(38).

When requesting the EPA to promulgate a more relaxed standard, the burden of proof is on the manufacturer at the agency hearing, not on the EPA(39). The EPA can compare evidence from different fields in promulgating regulations limiting the discharge of pollutants. The issue is not whether or not the EPA has substantial evidence from every scientific field, but whether or not it has substantial evidence on the record as a whole(40). The courts have held that the proper test for the review by the courts, of the EPA's conclusions is that the EPA have "substantial evidence" for its conclusions. This means that the conclusions must be supported by such relevant evidence as a reasonable mind might accept as adequate(41).

Section 1321

The courts have ruled that this section, which imposes liability for the costs of oil spill cleanup, is remedial and is to be construed liberally(42). In another interesting interpretation of the construction of the act, the

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courts stated that Congress had declared in its policy that there should be no discharges of oil or hazardous substances into the navigable waters; therefore, Congress did not intend for provisions of the Limitations Act to apply to the Government's recovery by setting different standards for both minimum and maximum liability on different dollar limitations(43).

The courts have stated that the only purpose of the oil spill cleanup provision is to create precise remedies solely for the United States to recover specified damages pursuant to a carefully devised formula(44). Another interpretation of the purpose of this section is that Congress intended to achieve a balanced and comprehensive remedial scheme by matching limited recovery of cleanup costs with strict liability, along with unlimited recovery with proof of willful conduct, and that Congress apparently intended to deter oil spills and recover cleanup costs in a manner that would protect most vessel owners from potentially crushing liability(45).

The courts have ruled that the provisions of this section defining the terms "remove" and "removal" to include removal of oil or hazardous substances, or taking other acts as may be necessary, to minimize or mitigate damage does not limit the standard of removability to actual physical removal. Instead, it sets the standard as the mitigation of harm through the neutralization of a harmful substance(46).

The provisions requiring notification of a discharge have been interpreted as Congress taking steps to ensure that the timely discovery of abatable hazards take place by requiring persons to disclose information concerning oil discharge(47). Corporations have been included in the class of persons in charge by the courts in determining who must notify the EPA of a spill(48).

The courts have ruled that a vessel discharging oil is liable, without fault, for the actual cleanup costs incurred by the United States(49). As to the liability for costs of removal, recovery under this section is measured by the Government's actual costs, regardless of their reasonableness(50). Regarding the liability for damages, one court held that a discharger can be liable for the reasonable cost for replacement, restoration, or alternative site mitigation for the loss of organisms. A court has noted, however, that replacement in environmental damages should be interpreted as meaning replacement as a component in a practical plan for actual restoration(51).

Section 1342

The courts have stated that the purpose of the NPDES permit was to be the only way that a discharger of a pollutant could escape total prohibition of discharges from point sources(52). The courts have ruled that the EPA has the authority to include, in an NPDES permit, a condition that the permit can be modified to reflect subsequently adopted, more stringent, toxic pollutant standards(53). Designation of substances as hazardous is a change in circumstances that gives rise to allowable changes in permits and enforcement of more stringent controls over discharges, even during the life of an existing permit. New limitations, however, must be issued and implemented in a manner that is reasonable and fair and which attempts to cause as little economic inconvenience as possible to dischargers whose permits are being modified(54).

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Subsection (k), which states that "Compliance with a permit issued pursuant to this section shall be deemed compliance (with the statutory standards) ... except any standard imposed under [Sect. 1317] for a toxic pollutant injurious to human health" has been interpreted as referring to toxic substances that would injure humans in relatively small quantities, not substances creating a human health hazard in the amount presently being discharged(55).

Section 1344

A court has held that the jurisdiction of the dredge and fill permit section is to the Constitutional limits(56). The activities that constitute a discharge have been broadly interpreted by the courts. A court has ruled that the clearing of a wetlands of trees and vegetation for a farming operation constituted a discharge that required a permit under the act(57). The court ruled that in order to qualify for an exception to the permit under section 1344(f), the activity must occur on a continuing basis as part of an ongoing farming or forestry operation(58).

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MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT
33 U.S.C. 1401 et seq.

LAW

This act consists of three titles: Title I, which concerns the regulation of ocean dumping; Title II, which is the research program of the National Oceanic and Atmospheric Administration; and Title III, which concerns the establishment of marine sanctuaries. Only Title I is discussed in this paper.

In Title I, commonly referred to as the Ocean Dumping Law, Congress stated that "Unregulated dumping of material into ocean waters endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities" [Sect. 1401(a)]. Congress declared that the purpose of Title I was to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping of materials that would adversely affect human health, welfare, or amenities, or the marine environment ecological systems, or economic potentialities [Sect. 140(b)].

According to the act, the following activities are regulated: the transportation by any person of material from the U.S. and the transportation by any U.S. vessel, aircraft, or agency of material located in or outside the United States for the purpose of dumping material into any ocean water; and the dumping of material transported by any person from a location outside the United States if the dumping occurs in the territorial sea or in the contiguous zone of the United States [Sect. 1401(c)].

Dumping is defined as a disposition of material except for effluents from any outfall structure regulated by the Clean Water Act or the Atomic Energy Act of 1954, routine discharge of effluence incidental to operation of motor driven equipment on vessels, construction of any fixed island or structure otherwise regulated, and deposits for fisheries purposes that are otherwise regulated [Sect. 1402(f)].

"Material" means matter of any kind or description including, but not limited to dredged material; solid waste; incinerator residue; and radiological, chemical, and biological warfare agents. Not contained in the term is sewage from vessels, which is covered by section 1322 of the Clean Water Act. Oil is included only if it is taken on board a vessel or aircraft for dumping purposes [Sect. 1402(c)].

The act authorizes the EPA to issue permits for the dumping of certain types of material from vessels or aircraft that the EPA believes will not unreasonably degrade or endanger human health or the marine environment. The

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EPA shall establish criteria for reviewing and evaluating permit applications based on, but not limited to, the following considerations:

(1) the need for the dumping;

(2) the effect of the dumping on human health and welfare;

(3) the effect of the dumping on fisheries resources, plankton, fish, shellfish, wildlife, shorelines, and beaches;

(4) the effect of such dumping on the marine ecosystem;

(5) the persistence and permanence of the effects of the dumping;

(6) the effect of dumping particular volumes and concentrations of such materials;

(7) appropriate locations and methods of disposal or recycling, including land-based alternatives;

(8) the effect of the dumping on alternative uses of oceans, such as scientific study, fishing, and other living resource exploitation, and nonliving resource exploitation; and

(9) the EPA, in designating recommended sites, shall utilize, wherever feasible, locations beyond the edge of the Continental Shelf [Sect. 1412(a)].

All permits must have published notice and the opportunity for public hearings prior to being issued. The information received by the EPA, or the Secretary of the Army, for permits for the disposal of dredged material, shall be available to the public, as a matter of public record at every stage of the proceeding [Sect. 1414(f)]. The Secretary of the Army may issue permits, after notice and public hearings, for the dumping of dredged materials if the dumping will not unreasonably degrade or endanger human health and the marine environment [Sect. 1413(a)]. The EPA must be notified prior to the issuance of any permit. In any case where the EPA disagrees with the Secretary of the Army on whether or not the Secretary should issue a permit, the EPA's opinion shall prevail [Sect. 1413(c)]. In cases where the Secretary of the Army finds no economically feasible method or site available, other than a dumping site for dredged material that would violate the criteria of the act, the Secretary may request a waiver from the EPA. The EPA must, within 30 days of the request, grant the waiver unless it determines that the dumping will result in unacceptable adverse impacts on municipal water supplies, shellfish beds, wildlife, fisheries (including spawning and breeding areas), or recreational areas [Sect. 1413(d)].

Section 1415 sets forth the civil and criminal penalties of the act. It also sets forth the civil actions available to private persons. The EPA can assess civil fines up to $50,000 for each violation of the act, its implementing regulations, or a permit issued thereunder [Sect. 1415(a)]. No penalty can be assessed without notice being given to the party and the opportunity

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for a hearing presented. Criminal actions can also be brought for violations of the act. Any person who knowingly violates the act may be liable for fines of up to $50,000 or imprisonment for not more than 1 year or both [Sect. 1415(b)]. Citizens can bring civil suits to enjoin any person, including the United States, who is alleged to be in violation of the act. No suit can be brought, however, unless 60 days notice of any alleged violation is given to the EPA or the Secretary of the Army or any alleged violator, or if the United States has commenced and is diligently prosecuting a civil action regarding the alleged violation, or if the EPA has commenced an action to impose a civil penalty or has initiated permit revocation proceedings, or if the United States has commenced a criminal action [Sect. 1415(g)].

COURT INTERPRETATIONS

The courts have ruled that the general demarcation line between the jurisdiction of the MPRSA and the Clean Water Act, with exception of pipes and outfalls, is the 3-mile limit of the territorial sea(1).

The courts have held that a hearing that involved a voluminous record before a city was allowed to dump at a site did not allow the EPA to issue a permit to another city to dump at the same site without a hearing(2). The EPA is required to first receive an application for a permit before they can announce any hearing with respect to an ocean dumping permit for sewage sludge. The EPA also is required to determine if the application tentatively satisfied the standards laid down in the EPA's regulations governing the proposed ocean dumping. The EPA is allowed to reach such a tentative conclusion based solely on the application itself and on other data available to them. It is required that other interested persons be notified at this stage and given an opportunity to challenge the tentative conclusions either through testimony or by presenting further information on alternatives or other aspects of the application(3). The courts have held that the required hearing should present an opportunity for persons opposed to the permit to challenge the selection of a particular site for dumping, even though the applicant and another city had dumped at the site in the past under EPA permits(4).

The designation of "interim" waste-dumping sites by the EPA, pending the completion of studies of the characteristics of these sites, was a short-term order capable of repetition, but would evade review if considered moot. Thus, a challenge to such a designation would not be moot, even though such an "interim" designation had expired(5). A case is considered "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy(6).

The act requires that the EPA consider, in connection with each application for the ocean dumping of sewage sludge, whether or not that particular dumping would necessarily degrade the marine environment in light of the factors listed in the act(7). THe EPA cannot lawfully adopt a policy of denying all permits without examining and weighing an applicant's evidence that the proposed ocean dumping is the most reasonable alternative(8). The court, in the same case, held that the EPA's ocean dumping regulations, which established a conclusive presumption of unacceptable harm arising from ocean

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dumping of sewage sludge, was arbitrary and capricious in this case. The court found that the EPA's assumption that there was a technologically practicable alternative to ocean dumping of the sludge in all cases, and in forcing New York City to proceed with interim steps of a land-based alternative without evaluating and finding acceptable the actual and potential environmental effects of the land-based disposal, was improper(9). The courts have stated that the section on the dumping permit program, section 1412, granted broad discretion to the EPA. Thus, the EPA's determinations of policy, law, and fact are all entitled to deference. The EPA may adopt criteria, instead of relying directly on factors described in section 1412, and the criteria may permit the EPA reasonably to treat some factors inapplicable in specified situations. Nothing in section 1412 requires that the EPA engage in a comprehensive balancing of the listed factors in deciding every ocean-dumping permit application(10).

The 1977 enactment of section 1412(a) on the dumping of sewage sludge and industrial waste, which precluded the EPA from permitting ocean dumping the sewage sludge after December 31, 1981, did not bar the EPA from considering New York City's claims in support of its request to renew an interim dumping permit. This occurred because section 1412(a) was wholly consistent with section 1412 of the act, both of which are governed by an indentical "unreasonable degradation" standard(11). The court stated that Congress had meant, by its absolute deadline of December 31, 1981, to incorporate the same degree of reasonableness as exists in the original act. The court supported this interpretation by noting that "sludge" is defined as a material that "unreasonably degrades" the ocean environment. Congress had meant, according to the court, to explicity end only the unreasonable degradation, not to end dumping irrespective of the consequences(12).

In reviewing the dumping permit program for dredged material, the courts have ruled that the practice of the district engineer of the U.S. Army Corps of Engineers in New York of pooling mortality data for a number of different species in evaluating bioassay test results to determine whether or not to grant ocean dumping permits was neither arbitrary or contrary to regulatory requirements(13). The practice of using a 10% mortality difference between control and test organisms in determining what constituted a significant undersirable effect due to chronic toxicity or bioaccumulation was neither arbitrary or contrary to regulatory requirements(14).

The courts have ruled that the 60-day notice requirement for the commencement of an action under section 1415, penalities, cannot be ignored(15). A project proposed by Federal agencies for the dumping of dredged spoil into the navigable ocean waters, which would allegedly damage the marine environment and the fisheries resources from which members of an organization derived a significant portion of their livelihood, was an allowable action under the act(16). As such, the proposal was subject to the permit issuance procedures of the act, including notice and opportunity for a public hearing, even though Congressional approval for the entire project was obtained prior to the effective data of the act(17). Funding for the project was appropriated separately for each stage of the project, and the portion including the dredging was put out for bid 1 month after the act went into effect(18).

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RESOURCE CONSERVATION AND RECOVERY ACT
42 U.S.C. 6901-6987

LAW

The Resource Conservation and Recovery Act (RCRA), originally built off of the Solid Waste Disposal Act of 1965 and the Resource Recovery Act of 1970, was substantially amended in 1984. Congress stated that the objectives of the act are to promote the protection of health and the environment and to conserve valuable material and energy resources [Sect. 6902(a)].

In the Congressional findings, section 6901, there is included the concept that disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment. Another finding is that the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment [Sect. 6901(b)(5)]. Congress noted that if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming [Sect. 6901(b)(5)]. In considering methods of disposal, Congress stated that certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes. As such, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes [Sect. 6901(b)(7)].

The act defines hazardous waste as "...a solid waste, or combination of solid wastes, which because of its quality, concentration, or physical, chemical, or infectious characteristics may:

(a) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or,

(b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." [Sect. 6903(5)].

The RCRA defines solid waste as any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges that are point sources

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subject to permits under section 1342 of the Clean Water Act; or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954 [Sect. 6903(27)].

Section 6905(b) requires the Administrator of the EPA to integrate all provisions of RCRA for the purposes of administration and enforcement, to avoid duplication, with the appropriate provisions of the Clean Air Act, the Clean Water Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act, and other acts Congress may designate. In the 1984 amendments, Congress required EPA to submit a report describing the current data on the emissions of polychlorinated dibenyo-p-dioxins from resource recovery facilities burning municipal solid waste. The EPA also must review the regulations applicable to the treatment, storage, or disposal of any coal mine wastes, promulgated by the Secretary of the Interior under the Surface Mining Control and Reclamation Act of 1977 [Sect. 6905(c)]. The Secretary of the Interior has the responsibility for carrying out the requirements of the hazardous waste management sections of RCRA with respect to coal mining waste or overburden for which a permit has been issued under the Surface Mining Control and Reclamation Act [Sect. 6905(c)].

The EPA is required to submit to Congress and the President, annually, a report on the activities of the Office of Solid Waste. The report shall include a statement of the detailed objectives for the activities and programs conducted under the act, a summary of the outstanding solid waste programs, and recommendations with respect to such legislation that the EPA deems necessary to assist in solving problems respecting solid waste (Sect. 6915).

The RCRA requires that the EPA, after notice and opportunity for public hearing, develop and promulgate criteria for identifying the characteristics of hazardous waste and for listing hazardous waste that shall be subject to the provisions of the act [Sect. 6921(a)]. The criteria shall take into consideration toxicity, persistence, and degradability in nature, potential for accumulation in time, and other related factors such as flammability, corrosiveness, and other hazardous characteristics. The EPA must promulgate regulations identifying the characteristics of hazardous waste and list particular hazardous wastes that shall be subject to the provisions of the act [Sect. 6921(b)]. The Governor of any State may petition the EPA to identify or list a material as a hazardous waste. If the EPA denies such a petition because of financial considerations, in providing such notice to the Governor it shall include a statement concerning such considerations [Sect. 6921(c)].

A major change in the law, Congress required EPA to promulgate standards under the act for hazardous wastes generated by generators in a total quantity of greater than 100 kilograms but less than 1,000 kilograms during a calendar month [Sect. 6921(d)]. These standards shall be applicable to the legitimate use, reuse, recycling, and reclamation of such wastes. While the standards may vary from those applicable to larger generators of hazardous waste, the standards shall be sufficient to protect human health and the environment. The wastes shipped off the premises by such a small quantity generator shall be accompanied by a Hazardous Waste Manifest form signed by the generator. The manifest must contain:

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(1) the name and address of the generator of the waste;

(2) the United States Department of Transportation description of the waste, including the proper shipping name, hazard class, and identification number (UN/NA), if applicable;

(3) the number and type of containers;

(4) the quantity of waste being transported; and,

(5) the name and address of the facility designated to receive the waste. [Sect. 6921(d)(3)].

The EPA's responsibility, under this portion of RCRA, to protect human health and the environment may require the promulgation of standards for hazardous wastes generated by a generator of less than 100 kilograms of hazardous wastes in a month [Sect. 6921(d)(4)].

Section 6921(e) requires that EPA list additional wastes containing chlorinated dioxins or chlorinated-dibenyofurans within 6 months after November 8, 1984. Within 1 year after November 8, 1984, the EPA, where appropriate, shall list wastes containing remaining halogenated dioxins and halogenated-dibenyofurans. Additionally, the EPA, not later than 15 months after November 8, 1984, shall determine whether or not to list the following wastes: chlorinated aliphatics, dioxin, dimethyl hychazine, TDI (toluene dirsoeyanate), carbonate, bromacil, linuion, organo-biomines, solvents, refining wastes, chlorinated aromatics, dyes and pigments, inorganic chemical industry wastes, lithium batteries, coke by-products, paint production wastes, and coal slurry pipeline effluent.

The act contains, in section 6921(i), an exclusion for a resource recovery facility that recovers energy from the mass burning of municipal solid waste. These facilities are not deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes under the act, provided that such a facility receives and burns only household waste and solid wastes from commercial or industrial sources that do not contain hazardous wastes listed under the act.

EPA is required, after notice and opportunity for public hearings and consultation with appropriate Federal and State agencies, to establish, through regulations, standards applicable to generators of hazardous waste identified or listed under the act, as may be necessary to protect human health and the environment [Sect. 6922(a)]. The standards shall include: record-keeping practices, labeling practices, use of appropriate containers, furnishing of information on general chemical composition of hazardous wastes, the use of a manifest system, and the submission of reports to EPA or an authorized State agency. Effective September 1, 1985, the manifest required under the act shall contain a certification by the generator that:

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(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator that minimizes the present and future threat to human health and the environment.

The EPA is required to establish standards applicable to transportation of hazardous wastes identified or listed under the act, as may be necessary to protect human health and the environment [Sect. 6923(a)]. The standards must contain, but are not limited to, requirements regarding: record-keeping, transportation of only properly labeled wastes, compliance with a manifest system, and transportation of wastes only to facilities permitted to receive such wastes under RCRA or the Marine Protection, Research, and Sanctuaries Act.

The EPA is required, under section 6924, to promulgate regulations establishing standards applicable to owners and operations of facilities for the treatment, storage, or disposal of hazardous wastes identified or listed under the act. These standards shall include, but not be limited to: maintenance of records; satisfactory reporting, monitoring, and inspection and compliance with a manifest system; treatment, storage, or disposal of all such waste; the location, design, and construction of facilities; contingency plans for effective action to minimize unanticipated damage from hazardous waste; the maintenance of operation of such facilities as to ownership, continuity of operation, training of personnel, and financial responsibility; and compliance with the requirements of permits for treatment, storage, or disposal. Effective 6 months after November 8, 1984, the placement of bulk or noncontainerized, liquid hazardous wastes in any landfill is prohibited [Sect. 6924(c)]. Also, EPA is required to, no later than 15 months after November 8, 1984, promulgate regulations that will minimize the disposal of containerized liquid hazardous waste in landfills and minimize the presence of free liquids in containerized hazardous waste to be disposed of in landfills. These regulations shall also prohibit the disposal, in landfills, of liquids that have been absorbed in materials that biodegrade or release liquids when compressed in normal landfill operations. The placement of nonhazardous liquids in landfills for which a permit is required under the act is prohibited 12 months after November 8, 1984. There is an exception to this requirement if the owner or operator of a landfill demonstrates that the placement of the liquid in the landfill will present a risk of contamination of any underground source of drinking water or that the only reasonable alternative to such disposal is its placement in a landfill that either contains or is expected to contain hazardous wastes [Sect. 6924(c)(3)].

Section 6924(d) prohibits the land disposal of certain hazardous wastes unless EPA determines that the prohibition is not necessary to protect human health and the environment for as long as the waste remains hazardous. In so doing, EPA must consider the long-term uncertainties associated with land disposal, the goal of managing hazardous materials in the first instance, and

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the persistence, toxicity, mobility, and propensity for the waste to bioaccumulate. This ban on land disposal for certain substances is effective 32 months after November 8, 1984. The act takes a similar approach to the disposal of solvents and dioxins, in section 6924(e). There, the land disposal of these wastes is banned 24 months after November 8, 1984, unless the EPA determines that one or more methods of land disposal will not harm human health or the environment. In section 6924(f), EPA is required, after 45 months from November 8, 1984, to complete a review of the disposal of hazardous wastes by injection into deep wells. EPA shall promulgate regulations prohibiting such disposal of wastes if it is reasonably determinable that such disposal may not be protective of human health and the environment. If EPA fails to make such a determination within the 45 months, then the disposal into any deep injection well of such hazardous waste is prohibited.

Section 6924(h) contains the variances from the land disposal prohibitions. An alternative date from those contained in the act may be selected. The selection of such a date is to be based on the earliest date on which adequate alternative treatment, recovery, or disposal capacity that protects human health or the environment becomes available. In any event, the other effective date cannot be later than 2 years after the effective date of the statutory prohibition. Variances can also be granted to individual facilities for 1 year with a possible 1 year extension. The applicant for such a variance must show a binding contractual commitment to construct or otherwise provide alternative capacity.

Section 6924(o) sets forth the minimum technological requirements of RCRA. For new landfills or surface impoundments, the section requires the installation of two or more liners, a leachate collection system above and between the liners, and ground water montoring. EPA must, not later than 30 months after November 8, 1984, promulgate standards requiring new landfill units, surface impoundment units, waste piles, underground tanks, and land treatment units for those hazardous wastes listed or identified under the act to utilize approved leak detection systems. The double liner requirement may be waived by EPA if the operator can demonstrate that alternative design and operating practices will prevent the migration of any hazardous constituents to ground or surface waters at least as effectively as the liner requirements. The section requires that leak detection systems be used in all new landfill units, surface impoundment units, waste piles, underground tanks, and land treatment units not later than 30 months after November 8, 1984.

The financial responsibility requirements of the act are contained in section 6924(t). The requirements here are to be established by EPA through promulgation of regulations. Any one of the following methods, or combination of methods, may be utilized: insurance, guarantee, surety bond, letter of credit, or qualification as self insurer. The total liability of any guarantor shall be limited to the aggregate amount that the guarantor has provided as evidence of financial responsibility to the owner or operator under the act. This limitation does not apply when the guarantor has acted in bad faith.

The RCRA requires, in section 6924(v), that EPA amend the standards regarding corrective action required by facilities for areas beyond the facility boundary where necessary to protect human health and the environment.

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This will not apply if the owner or operator demonstrates that despite his best efforts, he was unable to obtain the necessary permission to undertake such an action.

Section 6925 requires each person owning or operating an existing facility, or planning to construct a new facility, for the treatment, storage, or disposal of hazardous waste identified or listed under RCRA to have a permit. The applications for such permits shall contain:

(1) estimates with respect to the composition, quantities, and concentrations of any hazardous waste proposed to be disposed of, treated, transported, or stored, and the time frequency, or rate of which such waste is proposed to be disposed of, treated, transported or stored; and

(2) the site the which such hazardous waste or the products of the treatment of such hazardous waste will be disposed, treated, transported to, or stored.

Any permit issued under section 6925 shall be for a fixed term, not to exceed 10 years, for any land disposal facility, storage facility, or incinerator or other treatment facility [Sect. 6925(c)(3)]. Each permit for a land disposal facility shall be reviewed 5 years after issuance or reissuance and shall be modified as necessary to assure that the facility continues to comply with the currently applicable requirements of sections 6924 and 6925. The EPA can review and modify a permit at any time during its term.

Any surface coal mining and reclamation permit covering any coal mining wastes or overburden, which has been issued under the Surface Mining Control and Reclamation Act of 1977, is deemed to be a permit under section 6925 with respect to the treatment, storage, or disposal of such wastes or overburden [Sect. 6925(f)].

Section 6925(h) requires, effective September 1, 1985, that any permit issued under section 6925 shall include as a condition for the treatment, storage, or disposal of hazardous waste on the premises where the waste was generated, a program to reduce the volume or quantity and toxicity of the waste and that the proposed method of treatment, storage, or disposal is that practicable method currently available to minimize present and future threats to human health and the environment.

Section 6926 sets forth a program to develop authorized State hazardous waste programs. A State may develop and carry out such an authorized program in lieu of the Federal program. Any action taken by a State under a hazardous waste program authorized by RCRA shall have the same force and effect as action taken by the EPA under RCRA.

Section 6928 is the Federal enforcement provision of RCRA. Under this section, the EPA may issue a compliance order when it determines that any person has violated or is in violation of any requirement of the act. The order may assess a civil penalty or require immediate compliance, or both. The EPA may also bring a civil action for a temporary or permanent injunction.

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A penalty may be assessed by the EPA in the order, but the penalty cannot exceed $25,000 per day of noncompliance for each violation. The EPA is required to take into consideration the seriousness of the violation and any good faith efforts to comply with the requirements, in assessing the penalty.

A person who knowingly violates the RCRA may be subject to minimal penalties [Sect. 6928(d)]. Upon conviction, the person shall be subject to a fine of not more than $50,000 per day of violation, or imprisonment not to exceed 2 years, or both. Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under RCRA, who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000, or imprisonment for not more than 15 years, or both. If it is an organization that is at fault, it may be subject to a fine of not more than $1,000,000.

The RCRA contains a requirement that each State undertake a continuing program to compile, publish, and submit to the EPA an inventory describing the location of each site within the State at which hazardous waste has at any time been stored or disposed of [Sect. 6933(a)].

If the EPA determines that the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated, or disposed of, or the release of any such waste from such a facility or site may present a substantial hazard to human health or the environment, it may order such monitoring, testing, analysis, and reporting as deemed necessary to ascertain the nature and extent of such hazard [Sect. 6934(a)]. The EPA may conduct such analysis, testing, and monitoring if it determines that no owner or operator is able to conduct the activities or if there is no initially determinable owner or operator capable of conducting such activities. The EPA may bring a civil action to enforce such an order, with the civil penalty not to exceed $5,000 for each day of noncompliance.

Each Federal agency is required to establish a continuing program to compile, publish, and submit to the EPA, and to the States having authorized hazardous waste programs, an inventory of each site that the Federal agency owns or operates or has owned or operated at which hazardous waste is stored, treated, or disposed of at any time [Sect. 6937(a)]. The EPA is required to carry out the inventory program for those agencies it determines are not adequately providing information, after notification to the chief official of the agency.

Twenty-four months after November 8, 1984, no person may export any hazardous waste identified or listed under RCRA [Sect. 6938(a)]. Exception to the ban can be obtained if:

(a) such person provide notification to EPA;

(b) the government of the receiving county has consented to accept such hazardous waste;

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(c) a copy of the receiving county's written consent is attached to the manifest accompanying each waste shipment;

(d) the shipment conforms with the terms of the consent of the government of the receiving county; or

(e) the United States and the government of the receiving county have entered into an agreement and the shipment conforms with the terms of such agreement.

The EPA shall, no later than 15 months after November 8, 1984, submit a report to Congress concerning those substances identified or listed under the act that, not regulated by reason of the exclusion for fixtures of domestic sewage and other wastes, pan through a sewer system to a publicly owned treatment works (Sect. 6939). Eighteen months after the submission of the report, EPA shall revise its regulations as necessary to assure that the substances are adequately controlled to protect human health and the environment.

The act provides that no person shall fire, or in any other way discriminate against, or cause to be fined or discriminated against, any employee by reason of the fact that the employee has filed or caused to be filed any proceeding under the act (Sect. 6971).

The RCRA also provides for citizen suits (Sect. 6972). Any person may commence a civil action on his own behalf against any person who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order effective under the act. Actions may also be brought against any past or present generator, or the past or present owner or operator of a treatment, storage, or disposal facility, who has contributed any soil or hazardous waste that may present an imminent and substantial endangerment to health or the environment. Citizens may also bring civil actions against EPA for its failure to perform any nondiscretionary duty under the act.

Prior to the bringing of such an action the citizen must provide notice, 60 days before commencement of the action to: the EPA, the State where the alleged endangerment may occur, and any person alleged to have contributed to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste [Sect. 6972(b)]. The same notice provisions apply for actions brought alleging endangerment, except that the time frame is 90 instead of 60 days. Citizen suits are barred if the EPA has commenced and is diligently prosecuting an action under the act.

The court may award costs of litigation to the prevailing, or substantially prevailing, party when the court deems it appropriate. The act does provide that transporters are not deemed to have contributed hazardous waste if the transportation of such waste was under a sole contractual arrangement by rail and such carrier has exercised due care [Sect. 6972(g)].

Notwithstanding any other provision of the act, the EPA may bring suit on behalf of the United States if the past or present handling, storage, treatment, transportation, or disposal of any solid of hazardous waste presents

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an imminent and substantial endangerment to health or the environment [Sect. 6973(a)]. The EPA shall provide notice to the affected State of any such suit.

COURT INTERPRETATIONS

The courts have ruled that Federal statutory law has not preempted State prosecution of claimed public nuisances in the nature of water pollution(1). The courts also have noted that, since that PCB's are regulated under the Toxic Substances Control Act (TSCA), the Government cannot bring claim for improper handling, storage, and disposal of PCB's under the RCRA(2).

In addressing subchapter three of the RCRA (hazardous waste mangement), the courts have made a number of significant decisions. One court stated that "hazardous waste" does not lose that description just because it is mixed with some other waste or is found in leachate. Rather, leachate from hazardous waste is an important target of the RCRA, and the regulatory definitions of "discarded" waste and "disposal of" point directly to contaminated leachate(3).

In another case, the U.S. Supreme Court noted that a State law that prohibited the importation of most solid or liquid waste that originated or was collected outside the State was in violation of the Constitution's commerce clause(4). The Court did state that the State law was not in violation of Federal statutory law, including the RCRA. This may have left intact the New Jersey Supreme Court opinion that the Federal guidelines established under the RCRA are a minimum standard that States cannot operate below, but this does not prevent a State from imposing more stringent standards to hazardous waste operations within its borders(5). It would appear that the State requirements must not violate the commerce clause.

Regarding inspection of facilities, the courts have held that section 6927 of the RCRA is Consitutional where: (1) it prescribes entry by the EPA at reasonable times; (2) authorizes only such activities as are reasonable to ascertain the nature and extent of health hazards; and (3) requires the recipient of a monitoring order to have the opportunity to propose and perform a suitable investigation to ascertain the nature and extent of potential hazards(6). The courts also ruled that the contentions of the operator of a facility for the recycling and reclaiming of hazardous wastes that instances of business disruption occurred in execution of the administrative inspection warrant did not bar enforcement of the warrant(7).

The courts have ruled that Federal common law for the abatement of groundwater pollution as a nuisance has been preempted by Congressional regulations in this area(8). The courts also have stated that injunctive relief against the operator of a industrial waste disposal business, who was found to be in violation of Federal law, was proper even though the State officials failed to prove irreparable harm. The court stated that, when the activity at issue may endanger public health, injunctive relief is proper without resorting to balancing. The injunction also was proper because section 6928, which formed the basis for the plaintiff's claims, explicitly called for the issuance of injunctions to ensure compliance with the requirements of the act(9).

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Under the preamendment effective date section, section 6930, one court ruled that, to enjoin violations of law in an action brought against the operator of an industrial waste disposal business, evidence that wastes were hauled onto the operator's premises several months prior to the effective date of notification under section 6930 was admissible. The testimony was considered relevant to the issue of whether or not the operator maintained his hazardous treatment, storage, or disposal facility in violation of the law. Also, there was no hearsay component to the testimony, and the testimony was not unduly prejudicial(10).

The courts have decided, regarding section 6934 (monitoring, analysis, and testing), that the EPA acted reasonably in issuing an order for the inspection of a facility for recycling and reclaiming hazardous wastes where site visits, along with the sampling and analysis of the surrounding surface waters, revealed the presence of hazardous wastes and the release of hazardous wastes into the environment(11). The administrative warrant obtained by the EPA for the inspection of the facility was not overly broad where supporting documents showed reasonable grounds for the issuance of the warrant. The documents made clear that the facility operator was on notice of what testing activity was contemplated and that the activities that the EPA proposed to take were reasonable(12).

One of the provisions of the RCRA that has precipitated a significant amount of legal activity is section 6973, imminent hazard. The purpose of this section has been interpreted as empowering the courts to grant affirmative, equitable relief to the extent necessary to eliminate any risks posed by toxic wastes(13). The same court ruled that, inasmuch as there was uncontained leaking of wastes in a manner that might present an imminent hazard to health or the environment, the fact that the RCRA was not adopted and did not become effective until after the dumping of toxic wastes at a landfill had ceased did not bar the Government's action under the RCRA(14).

The courts have split on the applicability of the Federal common law of nuisance, as it regards this section. One set of courts held that the Federal common law of nuisance does apply, including language that the Federal common law of nuisance governs an action to abate groundwater pollution under section 6973(15). Another court stated that the comprehensive scheme established by the RCRA preempts the Federal common law of nuisance(16).

The courts have been consistent, to date, in holding that this section was meant to apply only to intrastate groundwater pollution(17).

The courts, in addressing who can be held liable under the section, have stated that owners of landfill property who purchased the property several years after all dumping of hazardous materials had ceased were "contributing to" the disposal merely by virture of their studied indifference to the hazardous condition that existed and, thus, could be held liable(18). Another court ruled that the owners and former operators of an inactive landfill could be sued under this section for their alleged failure to stop contaminants from leaking into the ground water. The court gave two reasons for its holding. First, the RCRA regulates hazardous conditions resulting from the disposal of wastes, in addition to regulating wastes before they are produced. Second,

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Congress meant the term "disposal" in the RCRA to apply to current human conduct, physical states, and occurrences, including situations where contaminants leak from landfills to create an endangerment(19).

In a case where the manufacturer of herbicides was not presently discharging a highly toxic substance and had agreed to move forward immediately to meet the requirements of an injunctive order, the court ruled that it was necessary to give the manufacturer a reasonable opportunity and reasonable time to accomplish the abatement of pollution and its risks(20).

One court has ruled that failure to allege that there is a continuing activity at a site of alleged pollution was not fatal to an action brought under the RCRA for the alleged contamination of the ground and groundwater(21).

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TOXIC SUBSTANCES CONTROL ACT
15 U.S.C. 2601 et seq.

LAW

The Toxic Substances Control Act (TSCA) grants power to the EPA to obtain data from industry on the production, use, and health and environmental effects of chemical substances. Not governed under the TSCA are pesticides, firearms and ammunition, tobacco, food, food additives, nuclear material, cosmetics, and drugs; these items are regulated by other laws [Sect. 2602(2)(B)]. The EPA has the authority to regulate the manufacturing, processing, commercial distribution, use, and disposal of covered chemical substances.

The EPA may require manufacturers or processors of potentially hazardous chemicals to, at their own expense, conduct tests on the chemicals (Sect. 2603). When determining whether or not to require the testing of a chemical substance, the EPA should consider if the manufacture, distribution in commerce, processing, use, or disposal of a chemical substance may present an unreasonable risk of injury to health or the environment; if there are sufficient data and experience on which the effects of the manufacture, distribution in commerce, processing, use, or disposal of such substances on the health or environment can reasonably be determined; and if testing of the substance is necessary to develop such data [Sect. 2603(a)(1)]. The health and environmental effects for which standards for the development of test data can be prescribed include carcinogenesis, mutagenesis, teratogenesis, behavioral disorders, cummulative or synergistic effects, and any other factor that may present unreasonable risk of injury to health or the environment [Sect. 2603(b)(2)(A)]. The characteristics of the substance to be tested include persistance, acute toxicity, and any other characteristic that may present a risk [Sect. 2603(b)(2)(A)]. The EPA, on receipt of any test data, will publish a Federal Register notice identifying the chemical substance for which data have been received. This notice also will include the use or intended uses of the chemical and a description of the nature of the test data [Sect. 2603(d)]. The TSCA established a committee, consisting of eight members from various agencies, that is to advise the EPA on which substances should be tested in the form of a priority list, published in the Federal Register. The number of substances on the priority list is not to exceed 50 at any given time, and the list is to be revised at least every 6 months [Sect. 2603(e)(1)].

The TSCA states that no person may manufacture or process a new chemical, or use an existing chemical for a significant new use, unless that person gives the EPA 90 days notice before manufacturing or processing the chemical [Sect. 2604(a)]. The notice to the EPA must include the name of the chemical; its chemical identity and molecular structure; proposed catagories of use; an estimate of the amount to be manufactured; the by-products resulting from the

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manufacture, processing, and disposal of the chemical; and any test data the manufacturer has that is related to the health and environmental effects of the chemical. If the substance falls under the testing requirements of section 2603 of the TSCA, the manufacturers must submit test data as well. The EPA must publish a notice in the Federal Register no later than 5 working days after receipt of the notice from the manufacturer, containing the identity of the substance and a description of any existing test data. The EPA may, for good cause, extend the 90-day review period for up to an additional 90 days [Sect. 2604(c)]. There are certain exemptions to the premarket notification requirement. These exemptions are if the substance is included in the categories listed on the inventory of existing chemicals, if the substance is to be produced in small quantities solely for experimental or research and development purposes, if the substance is to be used for test marketing purposes, if the EPA determines that the substance does not present an unreasonable risk, and if the EPA determines that the substance will be short-lived in the environment and will not give rise to unreasonable human or environmental exposure [Sect. 2604(h)].

The EPA can regulate the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance if they find that there is a reasonable basis for the conclusion that the chemical presents, or will present, unreasonable injury to health or the environment [Sect. 2605(a)]. This regulation allows the EPA to:

(1) prohibit or limit the manufacture of a chemical [Sect. 2605(a)(1)];

(2) prohibit or limit the manufacture of a chemical for a particular use [Sect. 2605(a)(2)];

(3) require that the chemical be marked with clear and adequate warnings and instructions with respect to its use [Sect. 2605 (a)(3];

(4) require that records be maintained of the manufacturing processes used [Sect. 2605(a)(4)];

(5) require that tests be conducted [Sect. 2605(a)(4)];

(6) regulate any manner or method of commercial use of such a substance [Sect. 2605(a)(5)];

(7) regulate any manner or method of disposal of such a substance [Sect. 2605(a)(6)];

(8) require the manufacturer of a substance to give notice of such unreasonable risk of injury to distributors [Sect. 2605(a)(7)];

(9) require manufacturers to give notice to the public of risk of injury [Sect. 2605(a)(7)];

(10) require manufacturers to replace or repurchase such a substance as elected by the person to which the requirement is directed [Sect. 2605(a)(7)];

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(11) require the manufacturer, to the extent reasonably ascertainable, to give notice to persons in possession or exposed to such a substance [Sect. 2605(a)(7)]; and

(12) require the manufacturer to submit a description of the relevant quality control procedures used in manufacturing if the EPA has a reasonable basis for doing so [Sect. 2605(b)].

The TSCA specifically requires the EPA to regulate polychlorinated biphenyls (PCB's). These regulations must include labeling and disposal regulations by July 1977, restriction for the use of PCB's to closed systems by January 1978, prohibition of all PCB production by January 1979, and prohibition of the distribution of PCB's in commerce by July 1979 [Sect. 2605(e)].

The TSCA allows the EPA to commence a civil action in a U.S. District Court for the seizure of an imminently hazardous chemical substance or any article containing such a substance [Sect. 2606a(1)(A)]. The EPA also may bring suit for relief against any manufacturer, processor, or distributor of an imminently hazardous chemical substance, or any article containing the substance [Sect. 2601a(1)(B)]. When purchases of such substances are known to the defendant, the authorized relief may include the issuance of a mandatory order requiring notice of the risk associated with the purchase, public notice of such risk, recall, the replacement or repurchase of such substance, or any combination of the above actions [Sect. 2606(b)(2)].

The TSCA contains a provision allowing citizens to bring civil actions under the act. Section 2619 allows citizens to sue persons violating the act and to sue the EPA to compel them to perform any nondiscretionary duty required by the TSCA.

Section 2620 allows citizens to petition the EPA to issue, amend, or repeal a rule under the testing, reporting, or regulatory sections of the TSCA, with the EPA having 90 days to respond. If the EPA decides to deny the petition, it must publish its reasons for doing so in the Federal Register [Sect. 2620(b)(3)].

The TSCA allows the courts to award reasonable litigation costs and attorney's fees, if appropriate, where the court action is taken under either the citizen suit or citizen petition sections of the act [Sect. 2619(c)(2); Sect. 2620(b)(4)(C)].

Unlike many of the environmental laws, the TSCA does not contain a section delegating enforcement authority to State governments. In fact, section 2617 preempts States from issuing any requirements applicable to a substance for which the EPA has issued a rule, unless the requirement is identical to the EPA's rule, is adopted under the Clean Air Act or other Federal law, or prohibits the use of the substance in the State.

Section 2613 requires the EPA to protect confidential data, such as trade secrets and privileged financial information, from disclosure, however, all health and safety information on a chemical in commerce submitted under the TSCA is subject to disclosure.

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COURT INTERPRETATIONS

The Toxic Substances Control Act, like many of the other acts that relate to toxic and hazardous wastes, is a relatively recent piece of the United States Code and, as such, has yet to develop a substantial body of judicial interpretations. The courts have interpreted the TSCA as being remedial in nature, and it should be given a construction consistent with this objective(1).

One court has interpreted the definition of the term "manufacturer" or manufacturer for commercial purposes to include the manufacture of small quantities of a chemical that the company would use solely for the purpose of product research and development. Therefore, the EPA was authorized to seek information from a company with respect to such chemicals pursuant to the section of the TSCA (Sect. 2607), on reporting and retention of information to obtain certain information from those who manufacture, process, or distribute, in commerce, any chemical substance or mixture(2).

There have been a number of court decisions centering around section 2605 of the TSCA, the regulation of hazardous chemical substances and mixtures. The courts have interpreted that the TSCA is generally designed to cover the regulation of all chemical substances(3). The courts have also ruled, however, that the abatement and prevention of water pollution by toxic substances, including PCB's, falls under the Clean Water Act(4).

The courts have stated that Congress intended to give States and localities some leeway to impose more stringent disposal requirements than those provided for by Federal regulations. Congress did not intend, however, according to the courts, to confer the authority on counties and other local governments to totally frustrate the disposal program through the implementation of total disposal bans(5).

In enacting the TSCA, the courts have said that Congress, in promulgating rules authorizing the use of PCB's, did not intend to preclude the EPA from using the criteria of the subsection governing the promulgation of rules for most chemical substances(6). The courts have upheld the EPA's discretion in approving a disposal site for PCB's where the requirements that a synthetic membrane liner be used, that the bottom of the landfill be at least 50 feet from the historic high-water table, and that the groundwater be monitored for chlorinated hydrocarbons were waived. The court held that the EPA's decision was based on relevant data and was in accordance with the law(7).

The courts have ruled that local ordinances that regulated, restricted, or prohibited storage of PCB's did not fall within the internal exemption to the preemptive effect of the TSCA, as it pertains to local regulations restricting or prohibiting the disposal of hazardous substances(8).

The courts have stated that the U.S. Courts of Appeals have the exclusive jurisdiction over actions that seek preenforcement judicial reviews of the rules promulgated under the TSCA imposing a ban on the manufacture, processing, or distribution of PCB's(9). The courts have held that this section grants the EPA the authority to regulate dangerous chemical substances, but in no way does it create a civil action under which damages could be recovered(10).

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There has been a ruling that states that the EPA is not required to file an EIS in connection with the storage of PCB's in a landfill(11).

The wording of section 2619, on citizen suits, has been interpreted as making it inappropriate for a county to have standing to sue under section 2619. The court stated that section 2619 would not prevent a class action by an organization on behalf of its members(12). In a citizen suit, property owners who were challenging the storage of PCB's in the county could not recover damages on a theory of eminent domain as a result of storage on adjacent land, in the absence of a showing that damage to their own property had occurred(13). [A common definition of eminent domain is the "power to take private property for public use"(14)]. In the same case, the court ruled that the property owners failed to state a cause of action for public nuisance because the PCB's were stored in accordance with the TSCA. The court also said that it would not enjoin, as a nuisance, an action authorized by valid legislative authority, and that TSCA preempted any local ordinances(15).

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THE COMPREHENSIVE ENVIRONMENTAL RESPONSE,
COMPENSATION, AND LIABILITY ACT
42 U.S.C. 9601 et seq.

LAW

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) was passed in 1980. Several definitions of terms are key to understanding the act and its implications. The act defines "release" as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment [Sect. 9601(22)]. Exceptions to the term "release" are releases that result in exposure to persons solely within a workplace, with respect to claims against employers; emissions from engine exhaust of transportation vehicles and pipeline pumping engines; releases from nuclear incidents, if the release is subject to the Nuclear Regulatory Commission requirements or those releases governed by the Uranium Mill Tailings Radiation Control Act; or the normal application of fertilizer [Sect. 6901(22)]. The terms "remove" or "removal" are defined as the cleanup or removal of released hazardous substances from the environment; such actions as may be necessarily taken in the event of the threat of release of hazardous substances into the environment; such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of a hazardous substance; the disposal of removed material; or other actions that may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment [Sect. 6901(23)]. In essence, removal actions tend to be relatively short-termed or interim in nature. In contrast, the definition of "remedy" or "remedial action" includes "... those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment" [Sect. 6901(24)]. The act defines "natural resources" as "... land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States... and State or local governments, or any foreign government" [Sect. 6901(16)].

The act requires that any person in charge of a vessel, off-shore facility, or on-shore facility must notify the National Response Center, established under the Clean Water Act, of any release of a hazardous substance in detrimental quantities [Sect. 9603(a)]. Persons who are so in charge and who fail to notify the government immediately on knowledge of a release may be subject to criminal sanctions or fines of not more than $10,000 or imprisonment for not more than 1 year or both [Sect. 6903(b)]. No notice is required if

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the release is governed under the hazardous waste control sections of the Resource Conservation and Recovery Act and has been reported to the National Response Center [Sect. 6903(f)].

Section 9604 authorizes the President to remove, or arrange for removal, and provide for remedial action wherever any hazardous substance is released or there is a substantual threat of such a release into the environment, or there is a release or substantial threat of a release of any pollutant into the environment that may present an imminent and substantial danger to the public health or welfare [Sect. 9604(a)]. The President can determine that such removal or remedial action will be done properly by the owner or operater of the vessel or facility from which the release or threat of release emanates or by any other responsible party.

Section 9604(i) establishes the Agency for Toxic Substances and Disease Registry within the Public Health Service, which is to establish and maintain a registry of serious diseases and illnesses, and a registry of persons exposed to toxic substances. This new agency also is to maintain an inventory of the health effects of toxic substances and to provide medical care and testing to persons exposed to toxic substances in public health emergencies.

Section 9605 requires the President to revise and republish the National contingency plan for the removal of oil and hazardous substances within 180 days after December 11, 1980. The revision is to include, among other items, methods for discovering and investigating facilities where hazardous substances have been disposed of and a method for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action.

The President, once it has been determined that there may be an imminent and substantial endangerment to public health or the environment because of an actual or threatened release, may require the Attorney General to secure such relief as may be necessary to abate the danger or threat [Sect. 6906(a)].

A key portion of the act is section 9607, which covers liability. The act states that the persons covered by this section are:

(1) the owner or operator of a vessel or facility;

(2) any person who, at the time of disposal, owned or operated any facility at which hazardous substances were disposed of;

(3) any person who arranged for the disposal or treatement of hazardous substances owned or possessed by such person; and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities [Sect. 9607(a)].

The liability of the above persons can include:

(1) all costs of removal or remedial actions incurred by the U.S. Government or a State not inconsistent with the National contingency plan;

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(2) any other necessary costs of response incurred by any other person consistent with the National contingency plan; and

(3) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

The defenses for liability for those who can prove so by a prepondence of the evidence include:

(1) that the release and resulting damages were solely caused by an act of God;

(2) that the release and resulting damages were solely caused by an act of war; and,

(3) that the release and resulting damages were solely caused by an act or omission of a third party other than an employee or agent of the defendant [Sect. 9607(b)].

The limits on liability are set forth in section 9607(c). These limits range anywhere from $300 per gross ton of a vessel to $50,000,000 plus all costs of a response. The owner, operator, or other responsible person can be responsible for the full and total costs of response and damages, however, if the release or threat of release was the result of willful misconduct or willful negligence; the primary cause of the release was a violation of applicable safety, construction, or operating standards or regulations; or such person fails or refuses to provide all reasonable cooperation and assistance. Section 9607(c)(3) also provides for possible punitive damages accruing to the United States in an amount not more than three times the amount of any costs incurred as a result of each failure to take proper action.

In a case of injury to natural resources, the liability shall be to the U.S. Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State [Sect. 9607(f)]. No liability for injury to natural resources shall exist if the injury was specifically identified in an environmental impact statement, or comparable environmental analysis, and the decision to grant a permit authorized such a commitment of natural resources (Sect. 9607(f)). The funds recovered by such an action shall be available for use in restoring, rehabilitating, or acquiring equivalent natural resources. The measure of damages shall not be limited to the sums that can be used to restore or replace such resources [Sect. 9607(f)]. There shall be no recovery under this subsection for damages occurring prior to December 11, 1980.

The act contains protections for employees who have provided information to Federal or State governments, have filed, instituted, or caused to be instituted any proceeding under the act, or have testified or are about to testify in any proceeding under the act (Sect. 9610). The protections are that no person shall fire or in any other way discriminate against any employee who participates in the above listed activities.

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The act provides, in section 9611(b), that claims may be asserted against the fund which result from a release, or threat of a release, of a hazardous substance from a vessel or facility for injury to, or loss or destruction of, natural resources, including damage assessment. The act places a limitation here in that any such claim can only be asserted by the President. In this role, the President is acting as trustee for natural resources over which the United States has sovereign rights, or natural resources within the fishery conservation zone of the United States to the extent they are managed or protected by the United States. This provision also applies to any State for natural resources, within the boundary of the State, that belong to or are managed by, controlled by, or appertain to the State.

The act allows for the use of the Hazardous Substance Response Trust Fund, created under the act, for the costs of the assessment of natural resources damages caused by a release [Sect. 9611(h)]. Any determination or assessment of damages for injury to natural resources shall have the force and effect of a rebuttable presumption on behalf of any claimant in any judicial or adjudicatory administrative proceeding under the act or section 1321 of the Clean Water Act [Sect. 9611(h)(2)]. Monies from the fund cannot be used to restore, rehabilitate, replace, or acquire the equivalent of natural resources until a plan for the use of such monies has been developed and adopted by the affected Federal agencies and the Governor(s) of any State(s) affected. The exceptions to this are situations requiring action to avoid irreversible loss of natural resources, to prevent or reduce any continuing danger to natural resources, or similar needs for emergency actions [Sect. 9611(i)].

The act requires that the President shall study and, not later than 2 years after December 11, 1980, shall promulgate regulations for the assessment of damages for injury to natural resources resulting from a release of oil or a hazardous substance [Sect. 9651(c)(1)]. The regulations shall specify standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and alternative protocols for conducting assessments, in individual cases, to determine the type and extent of short- and long-term injuries [Sect. 9651(c)(2)]. The regulations shall "... identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover." The regulations are to be reviewed and revised as appropriate every 2 years [Sect. 9651(c)(2)].

COURT INTERPRETATIONS

The courts have interpreted the Superfund to have a broad and liberal construction(1). This is to make effective Congressional concerns that the Federal Government immediately be given the tools necessary for prompt and effective responses to problems of National magnitude resulting from hazardous waste disposal(2). A court has ruled that the goal of the act is to clean up land disposal sites for solid and hazardous wastes before further damage occurs(3). It also insures that persons responsible for the problems caused by the disposal of chemical poisons bear the costs and responsibilities for remedying the harmful conditions they created(4).

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The courts have issued opinions regarding the applicability of Federal common law to the activities governed by the Superfund act. One court has stated that, assuming there once existed a Federal common law action for the abatement of groundwater pollution as a nuisance, it has been preempted by Congressional regulation of the area(5). Other courts have decided that the use of the Federal common law is appropriate in interpreting other provisions of the act. This has been true concerning the issue of liability. A court has stated that Congress intended for the courts to impose common law liability rules on waste generators and other entities liable under the act(6). The same court decided that the development of Federal common law is appropriate to fill in gaps of a Federal statute. Another court ruled that, in light of the strong Federal interest in the abatement of toxic waste sites and the need for a uniform liability standard, the courts are justified in developing common law on the issue of the scope of the liability of waste generators under the act(7). Thus, Federal courts can create Federal common law, when necessary, to protect uniquely Federal interests(8). For example, a court has ruled that Congress has empowered the Federal courts to establish Federal common law under section 9607 for the recovery of response costs and damages for injury to natural resources(9).

Concerning abatement actions, the courts have held that the act is not limited to application only when hazardous wastes cross State lines. Congress did not intend to incorporate the element of interstate effect required in Federal common law nuisance actions into the act(10).

Where the waste has been transported in interstate commerce, a court has ruled that nonresident generators of hazardous waste products may be liable to a State for the cleanup of large quantities of illegally dumped toxic wastes and for damages for the impairment of the State's natural resources allegedly caused by the dumping(11). In this case, the generators of the waste placed their wastes in the hands of an intermediary with no reasonable expectation as to where the materials were destined for disposal. This action was deemed sufficient by the court to subject the generators to the personal jurisdiction of the Federal court in the State where the disposal of the wastes occurred.

In determining whether an imminent and substantial endangerment to public health, welfare, or the environment exists, complaints alleging that many of the chemicals found in wastes disposed of by the allegedly offending party were carcinogens and toxic, combined with other allegations, were sufficient to state a claim under the act(12). The other allegations were that wastes were spilled, had leaked, and were discharged directly into the ground; that the wastes had entered and continued to enter the groundwater; that six wells had already been closed; and that contaminants would continue to move into the drinking water for a metropolitan area unless preventative measure were taken(13).

The courts have ruled that the liability section, section 9607, could be applied retroactively to render transporters of hazardous waste to a dump site liable for clearup costs in light of the clear and unequivocal statements and legislative history establishing Congressional intent to override the presumption against the retroactive application of this section(14). A court has stated that the whole purpose and scheme of CERCLA is restrospective and

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remedial in nature. The court did state that where Congress intended a liability provision of the act to have only prospective operation, as in the case of natural resources damages, Congress has stated so explictly(15). Another court stated that the fact that the act has retroactive application does not make it unconstitutional, for once it has been determined that Congress intended for the act to apply retroactively, there is a presumption of constitutionality(16). Further, the court held that the sections of the act that give the Government the authority to abate imminent and substantial endangerment and to recover cleanup costs, were intended to apply retroactively to hold past negligent offsite generators and transporters liable for response costs incurred after the effective date of the act(17).

The courts have held that the common law standard of joint and several liability is appropriate under the act(18). Joint and several liability is a complex legal doctrine. Joint liability exists where the actions of two, or more, persons have combined to produce a single, indivisible result(19). Several liability is where each defendant can be sued separately and held liable for the damage he has caused, even though others may have contributed to it(20). The courts have, under the act, held that where generators, transporters, and landowners were working in concert to produce a single divisable harm, all can be held jointly and severally liable for the response costs incurred by the Government in cleaning up the site(21). Thus, each defendant is liable for the entire harm(22). While each defendant is liable for the whole, the plaintiff, usually the Government in these cases, cannot recover the full amount from each defendant; it can only collect the full amount once(23).

The courts have decided that the legislative history of the act clearly establishes Congress' understanding that it was incorporating a standard of strict liability into the act(24). The doctrine of strict liability does not require a showing of negligence or fault on the part of the disposing party. Instead, all that is required is proof that the party did, in fact, dispose of wastes at the site. The decisions also hold that liability for specified response costs under section 9607 is absolute, with the only defenses being acts of God, acts of war, and certain acts or omissions of third parties(25).

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MIGRATORY BIRD TREATY ACT
16 U.S.C. 701-718

LAW

The United States has entered into a series of treaties with foreign Nations [Great Britain (Canada), Mexico, Japan, and the Soviet Union] for the protection of migratory birds(1). While these conventions do not expressly state that it is a Federal policy to conserve migratory birds, the 1976 treaty with the Soviet Union (ratified in 1978) obligates each of the Nations to identify areas of special importance in the conservation of migratory birds(2). The treaty further states that the Nations shall, to the maximum extent possible, "... undertake measures necessary to protect the ecosystems in those special areas ... against pollution, detrimental alteration, and other environmental degradation"(3).

Section 703 of the Migratory Bird Treaty Act (MBTA) makes it unlawful for anyone at anytime or in any manner to "... kill ..." any migratory bird unless permitted by regulations promulgated under the act. Any person, association, partnership, or corporation who shall violate any provisions of the treaties or sections 703 to 711 of the act, or who shall violate or fail to comply with any regulation made pursuant to the sections named, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $500 or imprisioned for more than 6 months or both [Sect. 707(a)].

COURT INTERPRETATIONS

While the MBTA does not directly address the killing of migratory birds by resource contaminants, the courts have interpreted the act as doing so. The courts have stated that the MBTA can be constitutionally applied to impose criminal penalties on persons who did not intend to kill migratory birds(1). The courts also have ruled that the MBTA includes poisoning as a prohibition on killing "by any means or in any manner"(2). The MBTA holds that the unlawful killing of even one migratory bird is an offense under the act(3).

The courts have held that, where a corporation engaged in the manufacture of a pesticide known to be highly toxic had failed to act to prevent this dangerous chemical from reaching a pond where it was dangerous to birds and other living organisms, it had performed an affirmative act in violation of the MBTA(4). The court went on to state that where a corporation was not aware of the lethal-to-birds quality of water in its pond, but was aware of the danger of the pesticide to humans, strict criminal liability would be imposed on the corporation, which was properly found in violation of the act(5).

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Regarding the election of prosecution counts, it has been held that the proper "unit of prosecution" is each act resulting in the death of one or more birds, not each dead bird(6). In other words, Congress did not contemplate multiple counts for a single action in violation of the act(7). The court also held that two counts, one for the violation of the Federal Insecticde, Fungicide, and Rodenticide Act (FIFRA) and the other for violation of the MBTA, were properly charged against an aerial operator who sprayed a farmer's field, which resulted in the death of waterfowl protected under the act(8).

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(7) U.S. v. F.M.C. Corp., 572 F.2d 902 (2d Cir. 1978).

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FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT AS AMENDED BY THE FEDERAL ENVIRONMENTAL PESTICIDE CONTROL ACT
7 U.S.C. 136 et seq.

LAW

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires that all formulators and producers of pesticides have their products and establishments registered with the EPA on the basis of submitted safety data. The act prohibits the distribution, sale, offer for sale, holding for sale, shipment, delivery for shipment, or receipt of any pesticide that is not registered with the EPA [Sect. 136a(a)]. The exemptions to this rule are that a pesticide can be transferred if the transfer is from one registered establishment to another, operated by the same producer, solely for packaging at the second establishment, or for use as a constituent part of another pesticide produced at the second establishment, or the transfer is pursuant to an experimental use permit [Sect. 136a(b)].

The FIFRA defines pesticides as any substance intended for preventing, destroying, repelling, or mitigating any pest and any substance intended for use as a plant regulator, defoliant, or desiccant. The term does not include "new animal drugs" or animal feeds [Sect. 136(u)].

Applications for the registration of pesticides must include the name and address of the applicant, the name of the pesticide, a complete copy of the labeling of the pesticide, and, if requested by the EPA, a full description of the tests made and results thereof (exemptions are that there is no requirement for an applicant to submit data on a registered pesticide that he or she intends to formulate into an end-use product, and no compensation is necessary to the owner of a purchased pesticide for use of data) [Sects. 136a(c)(1); 136a(c)(2)(D)]. The EPA is required to publish guidelines specifying the kinds of information that will be required to support the registration of a pesticide and to revise the guidelines from time to time [Sect. 136a(c)(2)(A)]. The EPA shall publish, in the Federal Register, a notice of applications if the pesticide would contain a new active ingredient or if it would entail a change of use pattern. The notice shall provide for a 30-day comment period, during which any Federal agency or interested person may comment [Sect. 136a(c)(4)].

The registration of a pesticide must be approved by the EPA if the agency determines that the proposed claims for the pesticide are warranted by its composition, that labeling and application requirements have been met, that the pesticide will perform its intended function without unreasonable adverse impacts on the environment, and that, when used in accordance with widespread and commonly recognized practice, it will not generally cause unreasonable

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adverse effects on the environment [Sect. 136a(c)(5)]. If the EPA determines that the above requirements are not met, they must so inform the applicant. The EPA can refuse to register the pesticide if the applicant does not correct the objected-to conditions within 30 days of the applicant's receipt of notice [Sect. 136a(c)(6)].

The EPA must classify a pesticide, as a part of registration, for either general or restricted use. General use classification is allowed when the pesticide will not cause unreasonable adverse effects on the environment. Restricted use classification is required if the pesticide may cause undesirable effects without additional regulatory restrictions [Sect. 136a(d)].

The EPA can consult with any other Federal agency in connection with any registration or application for registration [Sect. 136a(f)(3)]. The EPA can grant an experimental use permit for a pesticide only if it determines that the applicant needs the permit in order to accumulate information necessary to register the pesticide [Sect. 136c(a)]. If the EPA determines that the use of the pesticide may reasonably be expected to result in any residue on or in food or feed, it can establish a temporary tolerance level for the pesticide prior to issuing the experimental permit [Sect. 136c(b)].

The EPA shall cancel the registration of any pesticide at the end of a 5-year period, begining at registration, unless the registrant requests that the registration be continued in effect [Sect. 136d(a)(1)]. If, at any time after registration, the registrant has additional factual information regarding unreasonable adverse effects of the pesticide on the environment, the information must be submitted to the EPA [Sect. 136d(a)(2)].

If a pesticide, its labeling, or the required submissions do not comply with the provisions of the FIFRA, or the pesticide causes unreasonable adverse impacts on the environment, the EPA can issue notice of intent to cancel its registration or to change its classification or to hold a hearing to determine whether or not the registration should be cancelled or reclassified [Sect. 136d(b)]. The notice must be sent to the registrant and made public. If the EPA determines that suspension of the pesticide is necessary to prevent an imminent hazard to human health, the proposed cancellation or reclassification becomes final at the end of 30 days from publication or receipt by the registrant. Otherwise, the Secretary of Agriculture must be given 30 days to respond to the proposed changes [Sect. 136d(b)].

No person may produce a pesticide, or active ingredient, unless the establishment in which it is produced is registered with the EPA [Sect. 136(e)(a)]. Information required includes the types and amounts of pesticides currently being produced, types and amounts of pesticides produced during the last year, and pesticides sold or distributed during the last year. This information, other than the names of pesticides, shall be considered confidential [Sect. 136e(c),(d)].

The EPA cannot make public information that contains or relates to trade secrets or commercial or financial information obtained from a person, except that information relating to formulas of products may be revealed to any Federal agency consulted and at a public hearing or in findings of fact issued

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by the EPA [Sect. 136(h)]. The FIFRA makes it unlawful to detach, alter, deface, or destroy, in whole or in part, any labeling required by the act. It is unlawful to use any registered pesticide in a manner inconsistent with its labeling. It also is unlawful to add any substance to, or take a substance out of, any pesticide in such a manner that may defeat the act's purposes [Sect. 136j(a)]. The EPA is required, after consultation with other interested Federal agencies, to establish procedures and regulations for the disposal or storage of packages or containers of pesticides. The EPA also is to accept, at convenient locations, for safe disposal, pesticides for which the registration has been cancelled if requested to do so by the owner of the pesticide [Sect. 136q(a)].

The FIFRA provides that any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates the act is liable for a civil penalty of not more than $5,000 per offense. No civil penalty can be assessed unless a hearing is held first [Sect. 136L(a)]. Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who knowingly violates the FIFRA shall be guilty of a misdemeanor and shall be fined not more than $25,000 or imprisoned for not more than 1 year or both [Sect. 136L(b)].

COURT INTERPRETATIONS

The regulation of pesticides under the FIFRA has been held to be constitutional by the courts. The EPA's requirement that binding arbitration be used when an agreement cannot be reached between competitors for an amount of compensation for the use of a competitor's test data submitted to the EPA, however, was determined to be unconstitutional. The court stated that binding arbitration would unconstitutionally restrict sufficient access to judicial review and would leave the courts with no power to make any informed, final determination of a data-submitting registrant's right to compensation(1).

The courts have held that the retroactive provision of the 1978 amendments were not irrational or arbitrary. The provisions were determined to be a rational means for effectuating Congress's intent that the pesticide registration program be made more efficient and speedy, that competition be increased in the pesticide industry, and that potential hazards be disclosed to the public(2).

The courts have defined an item as a pesticide, thus requiring registration, when a reasonable consumer, given the label, accompanying circulars, advertising representation, and collectivity of circumstances, would use it as a pesticide. The fact that the product may have other, nonpesticide uses does not affect the need to register it(3).

There are a number of cases that address the use of one registrant's data to evaluate another registrant's application. The meaning of these cases, in general, is that the EPA's use of information contained in its files in issuing an experimental use permit for certain pesticides, on the same active agreement, did not violate the act(4).

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The FIFRA allows registrants, once the initial application requirements have been satisfied and the pesticide registered, to supplementally register another establishment to distribute its products or to make contractual arrangements for production of the registered pesticide(5).

The applicant has the burden of proof to establish that its product is entitled to registration(6).

The courts have stated that the provisions of the FIFRA, which were aimed at increasing the EPA's ability to protect the environment, were also designed to ensure that the economic interests of farmers and other consumers would be fully considered prior to the withdrawal of a pesticide from the market(7).

The EPA has broad discretion under the FIFRA to find facts and to set policy in the public interest(8). This discretion was conferred on the implicit assumption that interim action may be necessary to protect against harm to the environment or public health, while a fuller factual record is developed in proceedings when the cancellation of the product's registration is not in the atmosphere of a crisis(9). It is enough if there is a strong likelihood that serious harm will be experienced during the year or two required by the administrative process(10). The provisions of section 136d, which allow for emergency suspensions, are to be interpreted as defining the term "emergency" to mean there is a substantial likelihood that serious harm will be experienced during the 3 to 4 months required in any realistic projection of the administrative suspension process(11). Under section 136d, which requires that a registrant give the EPA "additional factual information" if the information is in the registrant's possession, the registrant must submit all data concerning the pesticide's adverse effects on the environment(12). The reliance on general data, and consideration of laboratory experiments, is sufficient basis for an order cancelling or suspending registration of a pesticide(13).

Judicial review of the EPA's decision to order an emergency suspension of certain pesticides includes the seriousness of the threatened harm, the immediacy of the threatened harm, the probability that the threatened harm would result, the benefits to the public of continued use of the pesticides in question during the suspension process, and the nature and extent of the information available to the EPA at the time of its decision(14).

The courts have stated that, if a person applies a pesticide in a way contrary to the directions on the label, he or she has violated the act(15). Anyone who is personally involved in recommending the use and supervising or overseeing the circumstances of the use of a pesticide cannot escape criminal liability for the use of a pesticide in a manner inconsistent with its label on the ground that he or she did not personally use the pesticide(16). Someone who has no personal knowledge of the location where the pesticide is to be used and merely answers a question about available pesticides by stating that there are a number of pesticides authorized for a particular use, however, would not be criminally liable(17).

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The courts have ruled that an administrative order denying the suspension of a pesticide on the ground that there was no reasonable threat of an "imminent hazard" was sufficiently final in its impact to warrant a judicial review of the action(18). The term "substantial evidence," required under section 136(n) for an EPA order to be sustained, is defined as such evidence, when considered on the record as a whole, that a reasonable mind might accept as adequate to support a conclusion(19).

The general pattern under the FIFRA is that persons seeking more stringent regulation may sue in district court, without first having an administrative hearing, while those complaining that the regulations are too strict must first exhaust their administrative remedy of a formal hearing before seeking judicial review(20).

The courts have held that organizations that are engaged in activities relating to environmental protection have standing to seek review of administrative refusal to suspend Federal registration of a pesticide. The organizations also can seek the review of administrative procedures that could terminate the registration(21).

The courts have upheld the EPA's authority to grant an emergency application to use a chemical for the control of pests in cases where the conditions specified in the regulations may be sufficient to find such an emergency. The EPA also can consider other emergency conditions in certain cases(22).

While the major goals of the FIFRA are to protect the consumer by keeping unhealthful or unsafe commodities off the market and to prevent the deception of consumers, the supervision of the grading of foodstuffs for the market has always been a matter of particularly local concern(23).

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(11) Dow Chemical Co. v. Blum, 469 F.Supp. 892 (E.D. Mich. 1979).

(12) Chemical Specialties Mfgs. Assn. v. Environmental Protection Agency, 484 F.Supp. 513 (D. D.C. 1980).

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(16) Id.

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(18) Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

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FISH AND WILDLIFE COORDINATION ACT
16 U.S.C. 661 et seq.

LAW

Congress noted the importance of wildlife resources to the Nation in its declaration of purpose for the Fish and Wildlife Coordination Act (FWCA) (Sect. 661). Congress authorized the Secretary of Interior to provide assistance to, and cooperate with, Federal, State, and public and private agencies and organizations in the "... protecting ... of species of wildlife, resources thereof, and their habitat, in controlling losses of the same from diseases or other causes ..." (Sect. 661).

Section 662 establishes the need for U.S. agencies that impound, divert, deepen channels, or otherwise control or modify the waters of any stream or other body of water, or public or private agencies under Federal license or permit who do so, to first consult with the U.S. Fish and Wildlife Service and the appropriate State agency with jurisdiction over the State's wildlife resources. The purpose of the consultation is to conserve wildlife resources by preventing loss of, and damage to, such resources, as well as providing for the development and improvement thereof in connection with the water resource development [Sect. 662(a)].

The reports and recommendations of the U.S. Fish and Wildlife Service and the appropriate State agency on the wildlife aspects of such water resource development projects "... shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or power ..." to authorize construction or approve modification of previously authorized plans [Sect. 662(b)]. The recommendations are to be as specific as practicable and include proposed measures for the mitigation or compensation of wildlife losses [Sect. 662(b)]. The agencies receiving the reports and recommendations shall give them full consideration, and the project plan must include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits [Sect. 662(b)].

The cost of planning for, and the construction, installation, and maintenance of the conservation means and measures, shall constitute an integral part of the cost of the project [Sect. 662(d)]. The limits on this are that the cost attributable to the development and improvement of wildlife cannot extend beyond that necessary for land acquisition, specifically recommended measures, project modifications, and modifications of project operations, and cannot include the operation of wildlife facilities.

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A statement must be included in any report submitted to Congress, supporting a recommendation for authorization of any new project for the control or use of water, estimating the wildlife benefits or losses caused by the project, including benefits to be derived from mitigation measures and the costs of providing wildlife benefits [Sect. 662(f)]. Projects that are exempt from this act are those impoundments of water of less than 10 acres or the activities of programs primarily for land management and use carried out by Federal agencies for Federal lands [Sect. 662(h)].

The act allows for the acquisition of lands, waters, and interests therein by the Federal construction agencies for wildlife conservation and development in connection with a project [Sect. 663(c)]. The properties thus acquired are to be used for such purposes and are not to be transferred or exchanged if the transfer or exchange would defeat the initial purpose of their acquisition [Sect. 663(d)].

The Secretary of the Interior, through the U.S. Fish and Wildlife Service and the U.S. Bureau of Mines, is authorized to make investigations to determine the effects of domestic sewage; mine, petroleum, and industrial wastes; erosion silt; and other polluting substances on wildlife (Sect. 665). The Secretary can make reports to Congress concerning such investigations and include recommendations for alleviating the effects of the pollution.

Section 666(a) provides that any person who is found guilty of violating any rule or regulation promulgated under Sections 661-666(c) shall be guilty of a misdemeanor and be fined not more than $500 or imprisoned for not more than 1 year or both.

The term "wildlife" is defined in the act as including birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation on which wildlife is dependent [Sect. 666(6)].

COURT INTERPRETATIONS

The courts have said that, although neither this act nor NEPA, by their terms, applies to State or private activities, unless conducted under Federal permit, Congress has sufficient power under the commerce clause to encompass Federal regulation of any activities affecting marine ecology(1).

It has been held that compliance with section 4331 of NEPA (the Congressional declaration of policy section) is de facto compliance with the consultation provisions of FWCA. The act, according to the courts, does not require that the U.S. Army Corps of Engineers' decision always correspond to the views of the U.S. Fish and Wildlife Service(3). The FWCA does require that the U.S. Fish and Wildlife Service's views be given serious consideration. The issuance of a permit by the Corps for the discharge of fill material into bodies of water, however, is not necessarily precluded by the unresolved objection of the U.S. Fish and Wildlife Service(4).

The act requires agencies, public or private, which are dredging and filling submerged lands under Governmental permit, to consult with the U.S.

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Fish and Wildlife Service with a view toward conserving wildlife resources(5). Congress also intended for the U.S. Army Corps of Engineers to consult with the U.S. Fish and Wildlife Service prior to issuing a permit for private dredge and fill operations(6).

Under the FWCA, the Corps, while it may recommend a mitigation plan to Congress, has no authority to provide for mitigation in the absence of specific Congressional authorization. Nevertheless, the party bringing the action may still attempt to prove that the Corps has departed from the Congressional policies set forth in the act, and that if such departure existed, it should be acknowledged in any EIS prepared by the Corps(7).

The courts have held that individuals and organizations, who were users of recreational facilities or that had sought to preserve and enhance the natural environment for the benefit of property, would suffer real injury as a result of a dredge and fill activity and, as such, they had standing to seek injunctive relief under the Administrative Procedure Act against the continuation of such construction by the Corps of Engineers(8).

The courts have stated that some degree of study and exercise of discretion is necessary in order for the Department of the Interior to determine whether or not an application for a NPDES permit falls within its scope of review under the FWCA(9).

The courts have ruled that the FWCA applies to the modification or supplementation of plans for previously authorized projects(10). Finally, the Department of the Interior did not abuse its discretion and, thereby, violate the act by reporting to the EPA that, due to a lack of personnel, it would take no action on a land developer's application for an NPDES permit(11).

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ENDANGERED SPECIES ACT
16 U.S.C. 1531 et seq.

LAW

Congress found, in section 2 of the Endangered Species Act [Sect. 1531], that various species of fish, wildlife, and plants in the United States have been rendered extinct due to economic growth and development untempered by adequate concern and conservation. Congress also found that other species have been so depleted in numbers that they are in danger of, or threatened with, extinction. Congress declared the purposes of the act are to provide a means whereby the ecosystem on which threatened and endangered species depend may be conserved and to provide a program to conserve the threatened and endangered species [Sect. 1531(b)]. Congress declared its policy to be that all Federal departments and agencies shall seek to conserve endangered and threatened species and shall use their authorities in futherance of the purposes of the act [Sect. 1531(c)(1)]. The term "take" is defined by the act as meaning to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct [Sect. 1532(19)].

Section 4 of the ESA [Section 1533] requires the Secretary of the Interior or, in some cases, the Secretary of Commerce to determine whether or not any species is threatened or endangered and to specify, to the maximum extent prudent and determinable, the critical habitat of any such threatened or endangered species. The act requires that such species be officially listed as endangered or threatened. The Secretary must review the list at least once every 5 years to determine if the species should be removed from the list or have its status changed from threatened to endangered or vice versa [Sect. 1533(c)].

The Secretary must issue regulations deemed necessary and advisable to provide for the conservation of threatened or endangered species [Sect. 1533(d)]. Section 1537 of the act states that each Federal agency shall, in consultation with and with the assistance of the Secretary, ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation with the affected States, to be critical [Sect. 1536(a)(2)].

Section 1539 of the act lists those activities that are prohibitied under the act, including the taking of any listed species within the United States or the territorial sea of the United States [Sect. 1538(a)]. The exemption to this prohibition is the taking of animals under a permit issued by the

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Secretary for scientific purposes or to enhance the propagation or survival of the affected species (Sect. 1539).

The act contains elaborate civil and criminal penalty sections in section 11[Section 1540]. The civil penalties range from fines of not more than $500 to fines of not more than $10,000 for each violation of the act [Sect. 1540(a)]. The opportunity for a hearing and notice must be given prior to any assessment of civil penalties. The criminal penalties range from fines of not more than $10,000 or 6 months imprisonment, or both, to fines of not more than $20,000 or 1 year imprisonment, or both [Sect. 1540(b)].

The act also allows for citizen suits against alleged violators of the act, against the Secretary to force him or her to apply the prohibitions of the act, or against the Secretary for failing to perform a nondiscretionary duty of the act [Sect. 1540(g)(1)]. The citizen suit section includes the standard 60-day preaction notice and the ban from suing if a civil or criminal action is being diligently pursued by the United States [Sect. 1540(g)(2)].

COURT INTERPRETATIONS

The courts have stated that the requirement under NEPA that all Federal agencies file an EIS for every Federal action significantly affecting the quality of the human environment does not apply to the listing of endangered or threatened species under section 4 of the Endangered Species Act (ESA)(1). Therefore, the U.S. Fish and Wildlife Service was exempt from filing an EIS before listing seven species of mussels as endangered species under the act. The court reasoned that the filing of an EIS would not have served the purposes of the ESA(2). In construing the ESA with the MBTA, the courts state that the two acts concern two distinct, though related, problems, and to read the requirements of the ESA into the MBTA would render the ESA, to some extent, superfluous(3).

Regarding the purposes of the act, the courts have said that Congress intended to give the protection of endangered species the highest priority(4). Under the ESA, the Secretary of the Interior must do more than merely avoid the elimination of a protected species. The Secretary must formulate and implement conservation programs to bring listed species to the point where the protections of the act are no longer necessary(5). Section 1536, on interagency cooperation, requires Federal agencies to ensure that their actions are not likely to jeopardize the continued existence of any endangered species or result in the destruction or modification of the species' habitat. It is the agency's duty to ensure that its actions are not likely to destroy or adversely modify the species' critical habitat, not just the area within the critical habitat that was to be set aside as a wildlife refuge(6).

The courts have held that the requirement of section 7 for all Federal agencies to act in consulation with, and with the assistance of, the Secretary of the Interior does not require acquiescence to the Secretary's opinion. Should a difference of opinion arise on a given project, responsibility for the decision after consultation is vested in the agency involved, not in the Secretary(7). This section also prohibits irreversible or irretrievable

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commitment of resources that would preclude the adoption of any reasonable and prudent alternatives included in the Secretary's biological opinion. This section applies when new information becomes available that indicates that the agency's action may have impacts on an endangered species, until consultation is reinitiated and a new biological opinion is prepared(8). The obligation to comply with the ESA and NEPA does not end with the preparation and promulgation of a final EIS. The ongoing duty of the Secretary of the Interior, where three research programs were well within the definition of "best scientific and commercial data" as established by the ESA, required him to consider as yet untapped sources of scientific and commercial data, even though much of it was not available when the final EIS was completed(9).

When a court receives an agency action on its merits under the ESA, the reviewing court must determine whether or not the agency acted within the scope of its authority and whether or not the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. In making the determination, the court must decide if the agency failed to consider all relevant factors in reaching its decision or if the decision itself represented a clear error of judgement(10).

The criteria that the courts say must be considered in assessing an award of attorney's fees in a citizen suit brought under the act includes:

(1) time and labor involved;

(2) novelty and difficulty of the questions involved;

(3) skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether or not the fee is fixed or contingent;

(7) the time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the undesirability of the case;

(11) the length of the professional relationship with the client; and

(12) awards in similar cases(11).

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SURFACE MINING CONTROL AND RECLAMATION ACT
30 U.S.C. 1201 et seq.

LAW

The Secretary of the Interior has the responsibility for carrying out the hazardous waste management provisions of the Resource Conservation and Recovery Act (RCRA), with respect to coal mining waste generated from coal mining operations permitted under the Surface Mining Control and Reclamation Act. The discussion on the RCRA, 42 U.S.C. 6905(c), contains information on what the hazardous waste management provisions entail and how they are designed to protect health and the environment.

COURT INTERPRETATIONS

A court has held that RCRA's provision authorizing the EPA to regulate solid waste does not conflict with SMCRA's requirements that Interior regulate surface coal mining operations. A court has ruled that at most, the two statutes may result in promulgation of two sets of guidelines on disposal of mining waste. Such regulatory overlap is not the same as a situation where two statutes provide mutually exclusive results when applied to the same facts, especially since SMCRA and RCRA are directed toward quite different objectives: SMCRA directly regulates surface coal mining, whereas RCRA provides guidelines for State regulation of open dumping(1).

A court has ruled that regulations promulgated pursuant to the SMCRA, requiring that toxic, acid-forming, and combustible materials be covered with a minimum of 4 ft of nontoxic and noncombustable material or be properly treated, were not arbitrary or capricious(2).

A court has upheld the Secretary's imposition of affirmative obligations under which a corporate permittee's agent was ordered, among other things, to remove toxic shale materials from a road and to surface the road with desirable material. The actions were justified in light of the facts that the agent's assets had created the danger and that the permittee had no assets or equipment. Also, the agent had failed to fulfill his delegated environmental responsibilities(3). The court reasoned that "refusal of the federal forum to implement affirmative obligations on...an agent would permit circumvention of the Act through the establishment of a sham corporation"(3).

Regarding the judicial standard of review, the proper standard is whether the agency has been arbitrary, capricious, acting in abuse of its discretion or otherwise inconsistent with the law. Under that standard, the Secretary of the Interior has shown support for the regulations promulgated pursuant to the

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SMCRA in the basis and purpose statement of the administrative record. The Secretary is not required to show that regulations adopted are necessarily the best or that they are the only possible method of regulation(4).

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(1) Chemical Manufacturers Association v. Environmental Protection Agency, 673 F.2d 507 (D.C. Cir 1982).

(2) In re Surface Mining Regulation Litigation, 456 F.Supp. 1301 (D. D.C. 1978).

(3) U.S. v. Dix Fork Coal Co., 692 F.2d 436 (6th Cir. 1982).

(4) In re Surface Mining Regulation Litigation, 456 F.Supp. 1301 (D. D.C. 1978).

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PORTS AND WATERWAYS SAFETY ACT OF 1972 AS AMENDED BY
THE PORT AND TANKER SAFETY ACT OF 1978
33 U.S.C. 1221 et seq.

LAW

The Ports and Waterways Safety Act (PWSA) establishes several authorities whereby the Secretary of Transportation, through the Coast Guard, can safely manage vessel traffic and protect U.S. waterways. Congressional policy, set forth in section 1221, states "... that navigation and vessel safety and protection of the marine environment are matters of major National importance." Congressional policy goes on to state that the increased supervision of vessel and port operations is necessary to reduce the possibility of vessel or cargo loss or damage to life, property, or the marine environment. Section 1222 defines the marine environment as "... the navigable waters of the United States and the land and resources therein and thereunder; the waters and fishery resources of any area over which the United States asserts exclusive fishery management authority, the seabed and subsoil of the Outer Continental Shelf of the United States, the resources thereof and the waters superjacent thereto; and the recreational, economic, and scenic values of such waters and resources."

The Secretary of Transportation is authorized to establish, operate, and maintain vessel traffic services for controlling and supervising vessel traffic to protect navigation and the marine environment. These measures can include reporting and operating requirements, surveillance and communication systems, routing systems, and fairways [Sect. 1223(a)(1)]. The Secretary is required to establish safe access routes for the movement of vessel traffic proceeding to or from ports or places subject to the jurisdiction of the United States. Prior to establishing these routes, the Secretary of Transportation must consult with the Secretary of State, the Secretary of the Interior, the Secretary of the Army, and the Governors of the affected States, to take into consideration all other uses of the area. These uses, where appropriate, include the exploration for, or exploitation of, oil, gas, or mineral resources; the construction or operation of deepwater ports or other structures on or about the seabed or subsoil of the submerged lands; the establishment or operation of marine or estuarine sanctuaries, and activities involving recreational or commercial fishing; and to the extent practicable, reconcile the need for safe access routes with the needs of all other reasonable uses of the area involved [Sect. 1223(c)].

In carrying out his duties under this act, the Secretary of Transportation shall take into account all relevant factors concerning navigation and vessel safety and protection of the marine environment including, but not limited to, the scope and degree of risk involved, the presence of any unusual cargoes,

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environmental factors, and the proximity of fishing grounds [Sect. 1224(a)]. The Secretary, at the earliest possible time, shall consult with representatives of the maritime community, ports and harbor authorities, environmental groups, and other affected parties [Sect. 1224(b)].

The act states that no vessel may operate in the navigable waters of the United States if the vessel has a history of accidents, pollution incidents, or serious repair problems that leads the Secretary to believe that the vessel may be unsafe or may create a threat to the marine environment [Sect. 1228(a)]. A vessel may not operate in U.S. waters if it discharges oil or hazardous materials in violation of any law of the United States or in a manner or quantities inconsistent with the provisions of any treaty to which the United States is a party [Sect. 1228(a)]. The Secretary can allow for provisional entry of a vessel if the owner or operator proves that the vessel is not unsafe or a threat to the marine environment, and either that it is no longer in violation of any applicable law, treaty, regulation, or condition or that such entry is necessary for the safety of the vessel or persons aboard [Sect. 1228(b)].

The act provides for both civil and criminal penalties for violations. The Secretary can, after notice and opportunity for a hearing, assess a civil penalty, not to exceed $25,000, for each violation with each day of a continuing violation constituting a separate violation [Sect. 1232(a)]. Any person who willfully and knowingly violates the act shall be liable for a fine of not more than $50,000 for each violation or imprisoned for not more than 5 years, or both [Sect. 1232(b)].

COURT INTERPRETATIONS

The courts have ruled that a State of Washington statute could not exclude oil tankers in excess of 125,000 DWT from Puget Sound because, under the Ports and Waterways Safety Act, the Secretary of Commerce had established vessel size and speed limitations that did not ban the operation of tankers of that size in the sound. The court held that enforcement of the higher State requirements would frustrate "the evident congressional intention to establish a uniform Federal regime controlling the design of oil tankers" and violate the Supremacy Clause, Art. VI, cl. 2 of the Constitution(2). Moreover, the Ports and Wateways Safety Act permits States to impose higher safety standards "for structures only" [33 USC Sect. 1222(b)].

One court, however, has ruled that Alaska's statute prohibiting oil tankers from discharging ballast into the territorial waters of the State, if the ballast had been stored in the vessel's oil cargo tanks, was not void just because it appeared to conflict with Coast Guard regulations promulgated under the PWSA. The objectives of the Alaska statute did not conflict with those of the Coast Guard regulations, and there was no irreconcilable conflict when the State statute and Coast Guard regulations were applied concurrently in State territorial waters(3). Thus, a State law should be preempted only to the extent necessary to protect the achievement of the aims of the Federal Act in question(4). The court stated that the possibility of proscription by a

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State, of conduct that a Federal law might permit, is not sufficient to warrant preemption of the State's law and that a finding of preemption is particularly inappropriate when the State is regulating conduct permitted by Federal regulations. This situation is allowed only as an exception to a broad Federal prohibition(5). The court has held that Congress did not intend that private enforcement actions be permitted under the act(6).

LITERATURE CITED

(1) Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

(2) Id.

(3) Chevron U.S.A., Inc., v. Hammond, 726 F.2d 483 (9th Cir. 1984).

(4) Id.

(5) Id.

(6) Patentas v. U.S., 687 F.2d 707 (3rd Cir. 1982).

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USED OIL RECYCLING ACT OF 1980
42 U.S.C. 6901a, 6903, 6935, 6843, 6948

LAW

Congress found and declared in this act that: used oil is a valuable source of increasingly scarce energy and materials; that technology exists to re-refine, reprocess, reclaim, and otherwise recycle oil; that used oil constitutes a threat to public health and the environment when disposed of or reused improperly; and that it is in the National interest to recycle used oil in a manner that does not constitute a threat to public health and the environment and that conserves energy and materials [Sect. 6901(a)]. The act defines used oil that has been refined from crude oil, used, when as a result of such use the oil has become contaminated by physical or chemical impurities [Sect. 6903(36)].

The act required that the EPA promulgate, no later than 1 year after October 15, 1980, regulations establishing such performance standards and other requirements as may be necessary to protect the public health and environment from hazards associated with recycled oil (Sect. 6935). The EPA is to ensure that the regulations do not discourage the recovery or recycling of used oil, consistent with the protection of human health and the environment.

The act provides that not later than 12 months after the date of enactment (November 8, 1984), the EPA is to propose whether to list or identify used crankcase oil as a hazardous waste under section 6921 of RCRA. Further, not more than 24 months after enactment, the EPA must make a final determination of this issue [Sect. 6935(b)].

States may include, at their option, a plan, as part of an approved State Solid Waste Disposal Plan filed with the EPA, to encourage the use of recycled oil in all appropriate areas of State and local government consistant with the protection of public health and the environment [Sect. 6943(b)]. Under the plan, States may establish a program, including any necessary licensing of persons and, where appropriate, the use of manifests, to ensure that used oil is collected, transported, treated, stored, reused, and disposed of in a manner that does not present a hazard to public health and the environment [Sect. 6943(b)(4)].

The act contains a provision for assistance to States that have approved plans [Sect. 6948(f)].

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COURT INTERPRETATIONS

No relevant court cases addressing this act in the context of the purpose of this paper were located.

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CONCLUSION

The Federal Government has established a framework for dealing with the problem of hazardous and toxic wastes. As can be seen from the discussion of the law and the court cases in particular, this framework is a very recent development. The laws concerning hazardous and toxic wastes are in a state of dynamic change and development. For example, the questions of the scope of liability and the applicability of Federal common law principles are just two of the issues that have yet to be fully resolved under many of these laws.

At this time, court decisions on many of the unresolved issues appear to be handed down almost weekly. The Current Developments section of the "Environment Reporter" is an excellent source of notification of available information on topics in the hazardous and toxic waste areas.

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This document is a synopsis of 13 Federal laws that may be used to address hazardous and toxic waste problems as they relate to the environment. It includes cases that illustrate how courts have interpreted these laws. The selection of both the laws and the court cases was made by the authors and is by no means exhaustive. Research was limited to Federal laws and Federal court interpretations, with a few exceptions to provide information that has Nationwide applicability.

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